No. 031274 MAR 5 - 2004

In The
Supreme Court of the United States

JUANITA SWEDENBURG, in her own capacity, JUANITA SWEDENBURG, as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity, DAVID LUCAS, as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK G. FITZGERALD, CORTES DeRUSSY, and ROBIN BROOKS,

Petitioners,

v.

EDWARD D. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; LAWRENCE J. GEDDA, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; JOSEPH ZARRIELLO, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; CHARMER INDUSTRIES, INC.; PREMIER BEVERAGE COMPANY LLC; PEERLESS IMPORTERS, INC.; LOCAL 2D OF THE ALLIED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION; EBER BROTHERS WINE AND LIQUOR CORP.; METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does New York's discriminatory and protectionist prohibition against direct interstate shipment of wine to consumers violate the Commerce Clause of the U.S. Constitution; and if so, is it "saved" by the 21st Amendment?

2. Does New York's discriminatory and protectionist prohibition against direct interstate shipment of wine to consumers violate the Privileges and Immunities Clause of the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Juanita Swedenburg, in her own capacity and as proprietor of Swedenburg Winery; David Lucas, in his own capacity and as proprietor of the Lucas Winery; Patrick G. Fitzgerald; Cortes DeRussy; and Robin Brooks.

Respondents who were defendants below are Edward F. Kelly, Chairman of the New York State Liquor Authority; and Lawrence J. Gedda and Joseph Zariello, Commissioners of the New York State Liquor Authority; sued in their official capacities.

Respondents who were defendant-intervenors below are Charmer Industries, Inc.; Premier Beverage Company LLC; Peerless Importers Inc.; Local 2d of the Allied Food and Commercial Workers International Union; Eber Brothers Wine and Liquor Corp.; and the Metropolitan Package Store Association, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the petitioners is a corporation.

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OPINIONS BELOW

The decision of which review is sought is reported at *Swedenburg v. Kelly*, slip. op., Nos. 02-9511, 03-7089 (2d Cir. February 12, 2004) and republished in the Appendix at 1a. The decision of the district court granting petitioners' motion for summary judgment is reported at 232 F. Supp.2d 135 (S.D.N.Y. 2002) (App. 34a). The district court's remedy is unpublished (App. 72a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 2003. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Commerce Clause, U.S. Const., art. I, §8, cl. 3 (App. 74a); the 21st Amendment (App. 74a); and the Privileges and Immunities Clause, U.S. Const., art. IV, §2 (App. 74a). Statutes involved include the Wilson Act, 27 U.S.C. §121 (App. 75a); the Webb-Kenyon Act, 27 U.S.C. §122 (App. 75a); the 21st Amendment Enforcement Act, 27 U.S.C. §122a (App. 76a); N.Y. Alco. Bev. Cont. Law §§102(1)(a), (c), and (d) (App. 80a); §§3(12-a), 76(4), 76(5), 76-a(6)(d), 99-b(1)(k), 105(9), and 130(1) (App. 86a-100a); and N.Y. C.L.S. Penal §10.00(4) (App. 101a).

STATEMENT

Petitioners are two small, family-run wineries in Virginia and California, respectively, and three New York consumers who would like to purchase their wines. For most alcoholic beverages, New York maintains a mandatory "three-tier" distribution system: producer to wholesaler to retailer to consumer. New York Alco. Bev. Cont. Law §102(1)(c) provides in relevant part that "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." Violation of the law is a criminal offense. N.Y. C.L.S. Penal §10.00(4) (App. 101a).

No license is available to out-of-state producers to traffic in alcoholic beverages, *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970); see also Jt. App. 699[1]; so that plaintiff wineries may distribute their products to New York consumers only if a licensed New York liquor wholesaler distributes their products. However, New York wineries enjoy the ability to sell and deliver wine directly to consumers through a number of provisions adopted over the years by the state legislature.[2] Most relevant to the instant case, N.Y. Alco. Bev. Cont. Law §§3(12-a) and

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[1] References to "Jt. App." are from the Joint Appendix submitted by the parties to the Court of Appeals.

[2] See, e.g., NY Alco. Bev. Cont. Law §76(4) (New York wineries can obtain retail licenses to sell "New York state labeled wines"); §76(2)(a) (New York wineries may conduct tastings of New York state labeled wines); §77(5) (New York wineries may sell New York state labeled wines on Sundays); §77(4)(b)(4) (New York wineries may sell the New York state labeled wines of other New York wineries); §76(5) (New York wineries may make deliveries on behalf of other New York wineries).

76-a(6)(d) (App. 80a and 94a) permit in-state farm wineries to distribute wine made from New York grapes directly to consumers through hired delivery mechanisms. Commercial wineries may obtain a retail license to sell New York wines under §76(4) (App. 88a), and then may deliver wine directly to consumers in vehicles owned or operated by a winery or hired through a registered trucking company pursuant to §105(9) (App. 98a). Those exemptions were enacted expressly to benefit New York wineries (Jt. App. 293, 299-301), see also (App. 54a-55a); and neither is available to out-of-state wineries.

The only way for an out-of-state winery to ship wine to New York consumers would be to establish a New York winery, which requires it to obtain a New York commercial winery license, maintain a staffed branch office and warehouse in New York, secure a retailer license, and then use its own or registered vehicles to deliver to "householders" only for use in their own premises under §77(2) (see Jt. App. 1564-1565). Thomas G. McKeon, general counsel for the New York State Liquor Authority, attests that no out-of-state winery has even attempted to navigate that system (Jt. App. 1564). Even were an out-of-state winery to have sufficient resources to open a New York winery, it would have none of the advantages available to farm wineries or the opportunities set forth in note 2, *supra*.

Before 1970, there were some opportunities for out-of-state wineries to ship directly to New York consumers, but the legislature closed those loopholes. "The law was enacted . . . to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages. . . ." *House of York*, 322 F. Supp. at 533.

Plaintiffs filed this lawsuit in 1999, challenging §§102(1)(c) and (d) as applied to prohibit direct interstate wine shipments as a violation of the Commerce Clause and Privileges and Immunities Clause.[3] After considering an extensive record and the parties' cross-motions for summary judgment, the district court found the ban unconstitutional under the Commerce Clause. Applying *Bacchus Imports v. Diaz*, 468 U.S. 263 (1984), the court applied a two-part constitutional inquiry. First, the court concluded that under the Commerce Clause, the state's differential direct shipment rules, under which "out-of-state wineries must consign their products to a (three-tier) wholesaler, [while] in-state wineries do not" (App. 53a), triggered Commerce Clause scrutiny. "That the New York direct shipping ban on out-of-state wine burdens interstate commerce and is discriminatory (on its face) is clear from the very wording (let alone the impact) of the exemptions favoring in-state wineries" (App. 53a). Not only does the system "provide an impermissible economic benefit and (protection) to only in-state interests," there exist "nondiscriminatory alternatives available to serve the state's interests" (App. 54a). The court found the effort and expense for an out-of-state winery to obtain a New York commercial winery license and to maintain separate facilities in the state to be "unreasonable" (App. 55a). As a result, the court concluded that the "ban on the direct shipment to New York of out-of-state wine is *not* 'evenhanded' and

[3] Plaintiffs also challenged the advertising ban under §102(1)(a) as a violation of the First Amendment. Both the district court and court of appeals invalidated that provision.

constitutes a per se violation of the Commerce Clause." (App. 57a (emphasis in original)).

The court then turned to the state's 21st Amendment defense, and found that "[t]he State has not established that its legitimate goals" of temperance and tax revenue "cannot be accomplished in a nondiscriminatory manner" (App. 64a). Because the court reached its conclusion under the Commerce Clause, it did not reach the Privileges and Immunities claim (App. 66a-67a). The court enjoined defendants from prohibiting out-of-state wineries from shipping wine to consumers on the same terms and conditions as New York wineries (App. 72a-73a).

The Second Circuit reversed. Though the court acknowledged that the district court had "rel[ied] on the method of analysis utilized by a number of other federal courts in similar challenges" (App. 9a), it proceeded to apply a different analysis "that only one other circuit court has employed" (App. 13a). Specifically, the court declined to engage in a "two-tier" analysis in which the statute is assessed separately under the Commerce Clause and the 21st Amendment (App. 12a), but rather it considered "the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause" (App. 13a). The court found that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state" (App. 25a). Although "fully recogniz[ing] that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol" (App. 26a), here the state's aim was to "ensure accountability" in

the context of alcohol (App. 27a), and therefore was within the state's 21st Amendment powers. Likewise, the scheme did not violate the Privileges and Immunities Clause because it "operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents" (App. 29a).

REASONS FOR GRANTING THE WRIT

The Court should grant the petition because the case satisfies the criteria set forth in S. Ct. R. 10(a) and (c). The decision below has contributed to a growing split of authority on an issue of great public importance. In doing so, it has decided the issue in a way that conflicts with relevant decisions of this Court. The only way to resolve the split and to reassert the authority of this Court's governing precedents is to grant the petition.

I. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE TO PRODUCERS AND CONSUMERS, GOING TO THE HEART OF INTERESTS PROTECTED BY THE COMMERCE CLAUSE.

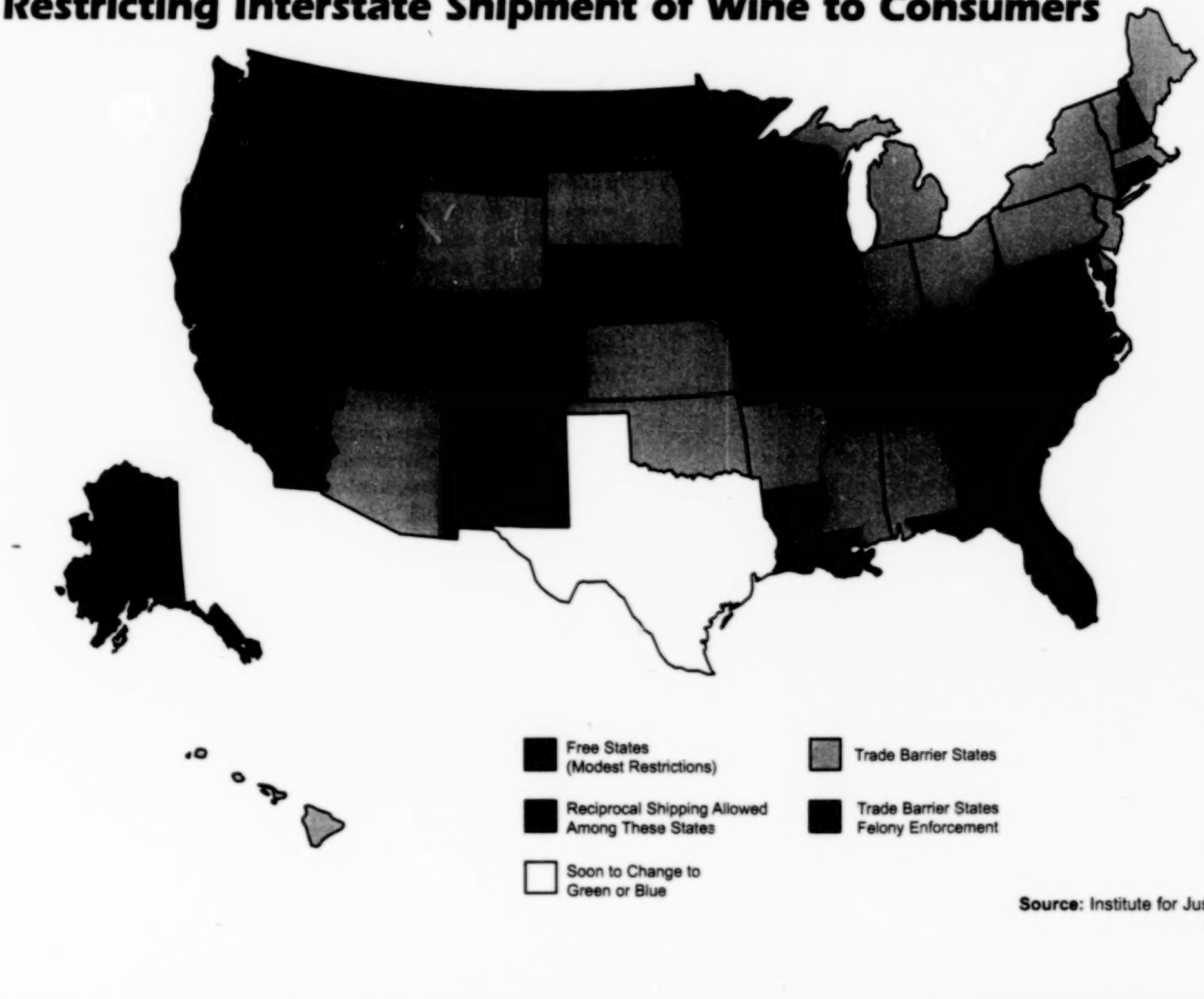
As this Court declared in *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824), "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." The precious individual rights protected by the Commerce Clause, and by its sister protection of entrepreneurial freedom, the Privileges and Immunities Clause, are essential to our functioning as a nation. As the Court stated in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949),

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition from every producing area in the Nation. . . . Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The petitioners in this case are two farmers and three consumers who humbly ask this Court to make good on that guarantee by removing a discriminatory and parochial trade barrier supported below and here by the state and a quartet of multi-billion dollar oligopolists.

The problem Mrs. Swedenburg and her fellow petitioners face is shared by producers and consumers across the United States. As the map on the next page illustrates, about half the states forbid the direct interstate shipment of wine to consumers, while the other half allow it (usually with a license requirement). Several of the states that prohibit direct interstate shipments, like New York, allow in-state wineries to ship directly to consumers. Even among the free-trade states, about a dozen are "reciprocity" states, allowing direct shipments only from states that themselves allow it. Some of the states that prohibit direct interstate shipments make it a felony. The resulting map depicts precisely the picture of "economic Balkanization" that the Commerce Clause was designed to prevent. *Hughes v. Okla.*, 441 U.S. 322, 325 (1979).

Restricting Interstate Shipment of Wine to Consumers



Source: Institute for Justice 2003:
www.ij.org

The effect of those trade barriers has been magnified by recent industry trends and technological innovations. The number of American wineries has increased exponentially to the point where there now are more than 2500 wineries in 49 states. In 1998, the top 25 wineries sold 82.7 percent of all wine, with the remaining wineries dividing the remainder. Most of the wineries outside the top 25 are family-run enterprises producing fewer than 5,000 cases annually (Jt. App. 184, 3535). At the same time, the wholesaler industry has contracted severely (Jt. App. 185-86, 279-86). The declining number of wholesalers can accommodate only a fraction of the growing number of wines produced each year (Jt. App. 190, 3534-35). For the vast majority of small wineries shut out of that process, direct shipping is the only viable option; and trade barriers like the challenged New York scheme effectively foreclose market access to thousands of wineries and wines (Jt. App. 201-02). See generally Shanker, "Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment," 85 *Va. L. Rev.* 353 (1999).

That restraint of trade occurs at a time when the Internet has made possible unlimited personalized economic transactions that would allow wineries to sell to consumers who wish to purchase their wine regardless of location (Jt. App. 675-78). A staff report by the Federal Trade Commission, based on extensive hearings, found that "State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003)[4]

[4] http://www.ftc.gov/os/2003/07/winereport2.pdf.

(hereafter FTC Report) at 3 and 14. The report found that such bans reduce consumer choice and increase prices. *Id.* at 3 and 16-25. It reported that the two dozen states that allow direct interstate shipments of wine successfully have fulfilled their legitimate regulatory objectives by constructing mechanisms to safeguard against underage access and, in some instances, to collect tax revenues. *Id.* at 4 and 26-39. But unless this Court reviews the decision below, the trade barriers that artificially constrict wine commerce in half the states will persist and the vast commercial promise of our technological era will be arrested.

II. THE CIRCUITS ARE PROFOUNDLY SPLIT IN MULTIPLE DIRECTIONS OVER THE APPROPRIATE ANALYTICAL FRAMEWORK FOR CASES AT THE INTERSECTION OF THE COMMERCE CLAUSE AND THE 21ST AMENDMENT.

A. The Circuit Split is Multifaceted, Growing, and Irreconcilable. In their petition for writ of *certiorari* in *Mich. Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (filed February 4, 2004) at 6, the wholesaler petitioners aptly described the split in the circuits over the issues presented here as "import alcohol anarchy." The jurisprudential cacophony increased markedly with the decision below, which introduced a new, previously uncharted dimension to the conflicting decisions among the five circuit court decisions that preceded it.

As the chart on the next page illustrates, six circuit courts of appeals have confronted the precise question of whether states that maintain two different sets of rules for direct wine shipments – one for in-state wineries and a more onerous set for out-of-state wineries – have exceeded constitutional boundaries.

SPLIT IN AUTHORITY OVER DIRECT INTERSTATE SHIPMENT OF WINE						
Citation	*Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)	*Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002)	*Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003)	*Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003)	*Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003)	*Swedenburg v. Kelly*, slip op. Nos. 02-9511, 03-7089 (2nd Cir. February 12, 2004)
Two sets of rules for in-state and out-of-state direct wine shipments?	Yes: State permits "local wineries, but not [out-of-state] wineries..to ship directly" (at 851).	Yes (at 1106-07)	Yes (at 515)	Yes (at 393)	Yes (at 521)	Yes (at 22-23)
Two sets of rules = facial discrimination?	No, because state "insists that every drop of liquor pass through its three-tiered system and be subjected to taxation" (at 853).	Yes (at 1109-11)	Yes (at 515)	Yes (at 397-400)	Yes (525)	No, because "wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state" (at 21).
Applicable precedent?	Various	*Bacchus* and *Milton S. Kronheim & Co. v. Dist. of Colum.*, 91 F.3d 193 (D.C. Cir. 1996) (at 1108)	*Bacchus* (at 513-15)	*Bacchus* is "the foundational case that established the modern jurisprudential framework for assessing state alcohol regulations under the Commerce Clause" (at 400).	*Bacchus* (at 524)	"We are hard-pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template" (at 19 n.10).
Two-part Commerce Clause/21st Amendment scrutiny?	Unclear	Yes (at 1108)	Yes (at 514)	Yes (at 400)	Yes (at 524)	No (at 10)
Strict scrutiny under Commerce Clause?	Unclear	No: State's burden is "far less than..strict scrutiny" (at 1114, n.17)	Yes (at 515)	Yes (at 396)	Yes (at 524)	No
Least-restrictive alternative required?	No	No (at 1114, n.17)	Yes (at 515)	Yes (at 396)	Yes (at 524)	No
Result?	**Constitutional**	**Vacate decision dismissing claim and remand for analysis of state's defenses**	**Unconstitutional**	**Unconstitutional**	**Unconstitutional**	**Constitutional**
Remedy?			Alter state law to forbid direct in-state shipment of wine to consumers	Allow out-of-state wineries to ship on same terms as in-state wineries (at 407-10)		

Before the decision below, the clear weight of authority found that such discriminatory rules violated the Commerce Clause and were not "saved" by the 21st Amendment. We cannot improve upon the summary of the court below, and reproduce it at length:

> Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, similar to that used by the district court here, in which the statute is first examined in the context of the dormant Commerce Clause. *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1008 (11th Cir. 2002). Under traditional dormant Commerce Clause analysis, a state regulation is unconstitutional if it "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local gains." . . . In each of the four circuit court cases, the regulatory scheme at issue was found to be facially discriminatory in violation of the dormant Commerce Clause. *Heald*, 342 F.3d at 525; *Dickerson*, 336 F.3d at 402-03; *Beskind*, 325 F.3d at 515; *Bainbridge*, 311 F.3d at 1109-11. Notwithstanding a finding that the regulatory scheme violates the dormant Commerce Clause, the statute can be "saved" by the Twenty-first Amendment in the second step, but *only if* it advances one of the Amendment's "core concerns." Under this two-tier analysis, none of the state statutes regulating the importation of alcohol were saved by the Twenty-first Amendment core concern examination. *See Heald*, 342 F.3d at 526-27; *Dickerson*, 336 F.3d at

403-07; *Beskind*, 325 F.3d at 516-17; *Bainbridge*, 311 F.3d at 1111-15.

(App. 12a (some citations omitted) (emphasis in original).)

The court below flatly rejected that analysis, declaring that "[w]e think this two-step approach is flawed because the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language" of the 21st Amendment (App. 12a-13a). Instead, the Second Circuit joined the Seventh Circuit, see *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001), in an inquiry that "considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause" (App. 12a). The different mode of analysis employed by the two sets of courts dictates the outcome, as both the Second and Seventh Circuits upheld bans of interstate direct wine shipping, in contrast to the Fourth, Fifth, Sixth, and 11th Circuits.

Those contradictory decisions and modes of constitutional analysis present a stark enough conflict among the circuits. But even the courts that reached similar results in some instances employed different legal frameworks or remedies, as the chart illustrates. For instance, while the Fourth, Fifth, and Sixth Circuits applied strict scrutiny under the Commerce Clause, see *Beskind*, 325 F.3d at 515; *Dickerson*, 336 F.3d at 396; *Heald*, 342 F.3d at 524; the 11th Circuit applied a standard it described as "far less than . . . strict scrutiny." *Bainbridge*, 311 F.3d at 1115. Moreover, while the Fourth and Fifth Circuits agreed that discriminatory direct shipment rules are unconstitutional, they ordered diametrically opposite remedies, with the Fourth Circuit holding that the exemptions for in-state

wineries should be stricken, *Beskind*, 325 F.3d at 517-20; while the Fifth Circuit ordered that the opportunity to direct-ship should be extended to out-of-state wineries. *Dickerson*, 336 F.3d at 397-400.

At least two other appellate court decisions dealing with similar issues also used different legal tests and reached differing outcomes. In *Milton S. Kronheim & Co., Inc. v. Dist. of Colum.*, 91 F.3d 193 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997), the D.C. Circuit affirmed a law forbidding the storage of alcoholic beverages outside the District, adopting a "mixed motive" analysis otherwise unknown in Commerce Clause jurisprudence before or since.[5] Compare *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138 (D.D.C. 1989), *aff'd*, 901 F.2d 1130 (D.C. Cir. 1990) (applying traditional Commerce Clause analysis in alcohol context). By contrast, in *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 63 P.3d 779 (Wash. 2003), the Washington Supreme Court struck down statutory distribution contract requirements from which in-state wineries were exempted, applying the same two-part analysis used by the Fourth, Fifth, Sixth, and 11th Circuits, while ordering the same extension of benefits remedy as the Fifth Circuit.

This discussion demonstrates that this is no simple or slight circuit split, if such a thing exists.[6] Rather, the split

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[5] The 11th Circuit crafted its legal standard by attempting to synthesize the holdings in *Bacchus* and *Kronheim*. *Bainbridge*, 311 F.3d at 1108.

[6] Indeed, the analysis of the court below conflicts not only with that of other courts, but of its own prior on-point precedent, which faithfully applied *Bacchus* and the traditional Commerce Clause 21st Amendment scrutiny it rejected below. See *Loretto Winery, Ltd. v.*

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is multidimensional and hopelessly irreconcilable, leading to wildly divergent results on identical issues. Moreover, the multiplicity of decisions in less than five years since the millennium indicates that these issues arise repeatedly, and indeed there are many more cases in the pipeline. Although a prevalent trend had been developing among the most recent decisions, the court below put an abrupt and jolting end to any prospect of jurisprudential harmony. The lower courts urgently need this Court's definitive guidance; and all of the wide range of interests affected – from producers and consumers of wine to state regulatory officials and even the middlemen seeking to protect their monopoly turf – need to know the applicable constitutional boundaries that apply to commerce in wine.

B. Any Effort to Harmonize the Cases Is Illusory. The court below made it clear that it was flatly rejecting the constitutional analysis applied by the Fourth, Fifth, Sixth, and 11th Circuits, pronouncing it "flawed" (App. 12a) and expressly adopting a different mode of analysis (App. 13a). Nonetheless, the court attempted to distinguish the contrary decisions by suggesting that "the statutes challenged in those cases were significantly different from the regulatory regime at issue here" (App. 13a, n.7).

Not so. The crux of the court's contention is that somehow the New York statute is nondiscriminatory, because supposedly "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state"

Gazzara, 601 F. Supp. 850 (S.D.N.Y.), *aff'd sub nom. Loretto Winery, Ltd. v. Duffy*, 761 F.2d 240 (2d Cir. 1985).

(App. 25a). The court contends that situation is "unlike in other states" (App. 8a). Although respondents have made such assertions about the unavailability of such mechanisms in other states, never have they backed them up with citations to statutes in the relevant states establishing residency requirements. To the contrary, the states at issue in *Heald* (Michigan),[7] *Dickerson* (Texas), and *Bainbridge* (Florida) do *not* appear to have residency requirements,[8] so that like in New York, at least theoretically an out-of-state winery could open an in-state winery and avail itself of some direct shipment options.[9]

But that is beside the point, because even to the limited extent that out-of-state wineries can gain access to direct shipping opportunities within New York, *the rules are still overwhelmingly skewed against them*. New York's scheme is replete with exemptions for in-state wineries,[10] which were adopted for avowedly protectionist motives

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[7] The court below cites *Heald*, 342 F.3d at 521, to the effect that "at present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents." The *Heald* court did not mean that Michigan imposes a residency requirement (it does not); but rather that an out-of-state winery cannot obtain a permit to ship directly to consumers in the state. That is exactly the situation here. *House of York*, 322 F. Supp. at 533 (no license exists for out-of-state wineries to ship into New York).

[8] Indeed, a residency requirement for alcohol licenses in Texas was struck down in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994).

[9] Even North Carolina (*Beskind*) authorizes the issuance of ABC permits to nonresidents so long as they have an agent in the state with power of attorney. N.C. Stats. §18B-900(2)(b).

[10] See note 2, *supra*, and accompanying text. Additionally, in 1995, the legislature overwhelmingly passed a law to permit direct interstate wine shipments. After a furious lobbying effort by liquor distributors, Governor Pataki vetoed the bill, citing concerns about the interests of in-state businesses and tax revenues (Jt. App. 477-536).

(App. 53a-54a).[11] The easiest and most common way for wineries to ship directly to consumers is by becoming a farm winery – a status that is *only available to New York wineries using New York grapes*. NY Alco. Bev. Cont. Law §§3(12-a) and 76-a(6)(d) (App. 86a and 94a). An out-of-state winery, by contrast, would have to open and staff a business office and a warehouse, and obtain winery, warehouse, and retail licenses in order to ship through authorized delivery methods to "householders" for consumption on the premises. §§3(37), 77(2) (see Jt. App. 1564-1565). That opportunity is at best theoretical, economically overwhelming for the small enterprises that comprise the vast majority of American wineries, and by no means substantially equivalent to the opportunities available to New York wineries. Little wonder then that "no out-of-state winery has applied for a license" under that system (Jt. App. 1564).[12]

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[11] Indeed, the court below disagreed with other circuits even on the critical threshold issue of whether exemptions for in-state wineries constitutes discrimination. Texas, for instance, also strenuously asserted that it did not discriminate against out-of-state wineries, a contention that the Fifth Circuit rejected. "To paraphrase the Bard, that which we call discrimination by any other name would still smell as foul. . . . The numerous ways in which in-state wineries are exempt" demonstrates that the system "is neither evenhanded nor incidental. . . ." *Dickerson*, 336 F.3d at 398.

[12] Respondents make much of the fact that one of petitioners' witnesses, John Dyson, ships wine from his California winery through his winery in New York. The point is that Dyson maintains functioning wineries in *both* states, and produces New York as well as California wines (thereby qualifying his New York winery as a farm winery), and therefore can avail himself of the full range of direct shipping opportunities available to New York wineries without incurring additional expense (Jt. App. 3600-3602). Contrast that situation with petitioner Swedenburg, who owns and operates a small winery. The cost of

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In the same breath that it contends the system is nondiscriminatory, the court below admits that the added costs and burdens applicable to out-of-state wineries (which it euphemistically refers to as the "physical presence requirement") "could create substantial dormant Commerce Clause problems if this licensing system regulated a commodity other than alcohol" (App. 26a). As the court points out, such Commerce Clause concerns arise only when there is discrimination, which triggers a virtual per se rule of invalidity. See, e.g., *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). How then can the state's scheme constitute a per se violation of the Commerce Clause and *not* be discriminatory?

Regardless of how the court below characterizes it, and viewed even in the most charitable manner, New York plainly applies two sets of rules to direct shipping of wine to consumers, one applicable to in-state wineries and another, far more onerous set to out-of-state wineries. That, as the court below acknowledges, presents a classic Commerce Clause violation. The result reached below in contradiction to the weight of circuit authority is the product not of any meaningful dissimilarity between New York's regulatory scheme and those struck down in Michigan, Texas, and North Carolina, but rather of the court's misguided belief that the 21st Amendment provides a safe harbor for discriminatory, protectionist trade barriers.

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opening a staffed office and warehouse in New York would be prohibitive (Jt. App. 3564-3566). Multiply those burdens by 50 states and two thousand or so small wineries, and the Court can begin to fathom fully the devastating economic impact that the court's ruling below, if allowed to stand, would portend.

III. THE COURT BELOW REPUDIATED THIS COURT'S APPLICABLE FRAMEWORK AND HAS INTRODUCED A DANGEROUS NEW ELEMENT INTO COMMERCE CLAUSE JURISPRUDENCE.

In upholding a discriminatory trade barrier serving the ends of economic protectionism, the court expressly declined to apply the *only* recent precedent of this Court that balances the competing provisions of the Commerce Clause and the 21st Amendment in the absence of an affirmative exercise of congressional power to regulate commerce. "We are hard pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template in analyzing the New York statute now before us" (App. 22a n.10).

Yet as the Fourth, Fifth, Sixth, and 11th Circuits – along with the Washington Supreme Court – have recognized, *Bacchus* provides precisely such a template when a court is faced with discriminatory trade barriers involving alcohol. Though the court below gives lip service to this Court's admonition that "'[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution'," and that it "considers each in light of the other, and in the context of the issues and interests at stake in any concrete case" (App. 13a, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), involving a prior New York alcohol trade barrier), the court went on to create a sweeping alcohol "exemption" (App. 13a) from the Commerce Clause that is utterly contrary to *Bacchus* and finds no support in caselaw. See, e.g., *Hostetter*, 377 U.S. at 331-32 (the notion that the 21st Amendment "has somehow operated to 'repeal' the Commerce Clause . . . [is] an absurd oversimplification").

In *Bacchus*, the Court confronted a Hawaii excise tax exemption for certain locally produced alcoholic beverages. The state raised the same defenses as respondents do here: that the statute advances legitimate state interests, it imposes no patent discrimination against interstate commerce, and the impact on interstate commerce is minimal. *Id.* 468 U.S. at 270. The Court agreed that the 21st Amendment provides broad state authority to regulate alcohol, but it declared that "one thing is certain: The central purpose of the [21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276. The Court rejected the state's defenses, finding that "the legislation constitutes 'economic protectionism' in every sense of the phrase." *Id.* at 272. To the argument that the law was "saved" by the 21st Amendment, the Court responded that the amendment does not "empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization." *Id.* at 276.

The Court has reiterated that analytical framework in Commerce Clause cases involving alcohol where Congress has affirmatively spoken, demonstrating contrary to the opinion of the court below that the 21st Amendment does not carve out an exemption to the Commerce Clause. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Calif. Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Even the case relied upon most heavily by respondents, which did not involve the Commerce Clause, did not undermine the holding in *Bacchus* that discriminatory trade barriers receive no shelter from the 21st Amendment. *N.D. v. U.S.*, 495 U.S. 423, 444

(1990) (Scalia, J., concurring in the judgment) ("All agree in this case that state taxes or regulations that discriminate . . . are invalid"); see also *id.* at 448 ("That is not to say, of course, that the State may enact regulations that discriminate").

By dispatching the Commerce Clause with such ease, the court below was able to avoid such niceties as the application of strict scrutiny or the virtual per se rule of invalidity; a genuine search for economic protectionism; or the shifting of the burden to the state to justify its policies, including the absence of less-discriminatory alternatives; all of which are time-tested, bedrock principles of Commerce Clause jurisprudence. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Hunt*, 432 U.S. at 353.

Instead, the Court below cursorily concluded that "we find no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests" (App. 25a). In so doing, the court completely ignored not only the strong inference of protectionism yielded by the presence of discrimination, see *Camps Newfound*, 520 U.S. at 581-82, but also the abundant evidence of economic protectionism in the record. Indeed, the district court in *House of York*, 322 F. Supp. at 533, found that a major purpose of the law was "to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages"; and the district court below observed that "the Defendants explicitly concede the exceptions [for in-state wineries] were intended to be explicitly protectionist" (App. 54a-55a). Hence, the case in that respect is exactly like *Bacchus*, 468 U.S. at 271, in which the state likewise conceded that the

exceptions were for the benefit of in-state economic interests.

And unlike the Court in *Bacchus*, the court below accepted at face value the state's defense, namely that "physical presence" is essential to accountability (App. 25a-29a).[13] Nor did it require the state to justify the burdens "in terms of . . . the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. Had it done so, it would have found, based on the uncontroverted evidence presented by petitioners, that the states that allow direct interstate shipping have created mechanisms to ensure accountability, such as permits, remission of taxation, and protections against underage access; and that those mechanisms are achieving their goals. See, e.g., FTC Report at 3 and 26-39. The court below reasons that "[r]equiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless" (App. 28a). In reality, they don't have to: Congress recently adopted the 21st Amendment Enforcement Act, 27 U.S.C. §122a (App. 76a), which provides state attorneys general the authority to prosecute in their own federal courts violations of state alcohol laws against out-of-state producers.

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[13] Indeed, even the Seventh Circuit in *Bridenbaugh*, 227 F.3d at 851, to which the court below purports to adhere, dismissed the state's defense of maintaining "orderly market conditions" as "a euphemism for reducing competition and facilitating tax collection" – precisely the objectives identified for the law by the district court in *House of York*, 322 F. Supp. at 533.

Finally, by embracing a "physical presence" requirement that obligates an out-of-state winery to become a New York winery, which requires it to establish and staff a business office and warehouse in order to conduct business on terms remotely approaching those available to in-state wineries, the court below introduced a poisonous concept into Commerce Clause jurisprudence.[14] If a state could avoid a Commerce Clause violation by declaring, as did the court below, that there is no discrimination because everyone is required to have a business facility here, it would render the Commerce Clause a dead letter. An individual or company can always, theoretically, move to or establish operations in another state in order to avail themselves of trade opportunities available to residents; but the point of the Commerce Clause is they shouldn't have to.[15] As this Court has declared, the Commerce Clause forbids states from requiring out-of-state firms "to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64,

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[14] The court below suggests that this concept is confined to "this unique area of commerce" (App. 26a); but in fact it builds upon another recent decision of the same court upholding a requirement of a "bricks and mortar" presence in the state in the context of direct sales of cigarettes. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003).

[15] In contrast, petitioners have no objection whatsoever to having to obtain a license, submitting to jurisdiction (although that is unnecessary in light of the 21st Amendment Enforcement Act), paying taxes, or abiding reasonable regulations imposed by the host state. Indeed, that is precisely the system employed by the more than two dozen states that allow direct interstate shipping. See, e.g., La. R.S. 26:359(B)(1); Nev. Rev. Stat. Ann. §369.462; and N.H. RSA 178:14a(V).

72 (1963).[16] The physical presence requirement – oppressive as it is here, and palpably unnecessary in light of less-burdensome alternatives – makes a mockery of the protections of the Commerce Clause.

If indeed the 21st Amendment was not designed to repeal, but only to modify, the precious liberties protected by the Commerce Clause, it is essential that this Court grant the petition and overturn the decision below, which eviscerates those protections.

IV. THIS CASE IS ESPECIALLY APPROPRIATE FOR REVIEW OF THIS ISSUE BECAUSE IT ALSO PRESENTS A CLAIM UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

Most of the challenges to discriminatory barriers to interstate direct wine shipments (including the Michigan case pending on a petition for writ of *certiorari*) have been fought exclusively on the terrain of the Commerce Clause and the 21st Amendment. This case presents a second claim that stands on its own as a basis for overturning the ruling below, but which also should help to inform the Court's decision on the Commerce Clause issue: that the discriminatory trade barrier violates the Privileges and Immunities Clause.

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[16] The court's distinction between a "physical presence" and a "residency" requirement is a distinction without a difference. "Physical presence" in this context entails establishing an entirely separate business operation in New York, a fact that would render the facility a resident of New York.

Although the 21st Amendment limits somewhat the scope of the Commerce Clause, "it places no limits whatsoever on other constitutional provisions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 515 (1996); cf. *Craig v. Boren*, 429 U.S. 190 (1976) (21st Amendment does not limit application of the equal protection clause). Hence while this case and others like it require the courts to assess the appropriate lines of demarcation between the Commerce Clause and 21st Amendment, no such analytical line-drawing is necessary with respect to the Privileges and Immunities Clause because it retains its full vitality.

The Commerce Clause and Privileges and Immunities Clause are "mutually reinforcing." *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978). While the Commerce Clause protects free trade among the states, the Privileges and Immunities Clause protects the vital individual rights that are bound up in such trade. "[T]he pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *United Bldg. & Constr. Trades Council of Camden Cty. v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (1984).

As this Court recognized in *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State."[17] That, of course, is precisely what

[17] Indeed, there does not even need to be an express provision identifying out-of-state citizenship as a basis for disparate treatment to proceed with a privileges and immunities claim. *Hillside Dairy Inc. v. Lyons*, 123 S. Ct. 2142, 2147 (2003). Here, the New York statutes are replete with overt preferences for New York wineries.

the state has deprived the winemaker plaintiffs of in this case.[18] Where such discrimination occurs, the judicial inquiry "must be concerned with whether [valid justifications] exist and whether the degree of discrimination bears a close relation to them." *Id.* Accord, *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985). Although the district court applied precisely such an analysis (under the Commerce Clause), the court of appeals did not.

The Privileges and Immunities analysis dictated by *Toomer* happens to dovetail nicely with the Commerce Clause analysis applied in *Bacchus*. That makes sense: however much the 21st Amendment may have narrowed the scope of the Commerce Clause, surely it could not do so in a manner that would trigger a violation of another constitutional protection. In a sentence, it would be fair to say that the 21st Amendment modifies the Commerce Clause to the extent that it provides states with wide latitude to order their alcohol importation and distribution structures; but not so far as to eviscerate the right of out-of-state entrepreneurs to operate on substantially equivalent terms with in-state business interests. For the Court to decide this issue without reference to the Privileges and

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[18] The court below makes quick work of the Privileges and Immunities Clause, asserting that "the statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents" (App. 29a). That is quite different from finding, as this Court required in *Toomer*, 334 U.S. at 396, that the state must provide such opportunities "on terms of substantial equality." Given that the burdens placed on out-of-state wineries are so heavy that the court below conceded they ordinarily might constitute a per se violation of the Commerce Clause (App. 26a), it seems clear that this claim deserved a bit more contemplation than the cursory and dismissive analysis provided below.

Immunities Clause could lead to multiple cases and erroneous line-drawing, such as was performed by the court below.

Another reason to address this issue in the context of both clauses is that some justices have expressed the belief that negative Commerce Clause jurisprudence is misguided, and that much of the rights protected under that clause were in fact intended to be protected by other clauses. See *Camps Newfound*, 520 U.S. at 609-39 (Thomas, J., dissenting). This case would provide an ideal vehicle for the Court to decide this important issue with the benefit of all relevant constitutional claims having been raised. Such an inquiry would serve not only the interests of judicial economy but the ends of justice.

CONCLUSION

For all the foregoing reasons, petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: September 3, 2003 Decided: February 12, 2004)

Docket Nos. 02-9511, 03-7089 Con

JUANITA SWEDENBURG, in her own capacity, JUANITA SWEDENBURG, as proprietor of Swedenburg Winery, a Virginia partnership, DAVID LUCAS, in his own capacity, DAVID LUCAS, as proprietor of The Lucas Winery, a California sole proprietorship, PATRICK G. FITZGERALD, CORTES DERUSSY, ROBIN BROOKS,

Plaintiffs-Appellees,

–v.–

EDWARD F. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities, LAWRENCE J. GEDDA, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities, JOSEPH ZARIELLO, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities,

Defendants-Appellants,

CHARMER INDUSTRIES, INC., PREMIER BEVERAGE COMPANY LLC, PEERLESS IMPORTERS INC, LOCAL 2D OF THE ALLIED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION, EBER BROTHERS WINE AND LIQUOR CORP, METROPOLITAN PACKAGE STORE ASSOCIATION, INC.

Intervenor-Defendants-Appellants.

Before: NEWMAN, SOTOMAYOR, AND WESLEY, *Circuit Judges*.

Appeal from an order of the United States District Court of the Southern District of New York (Berman, J.), entered on December 12, 2002, in which the district court granted plaintiffs-appellees' motion for summary judgment and denied defendants-appellants' motion for summary judgment. The court also enjoined defendants-appellants from enforcing sections 102(1)(a), (c) and (d) of New York's Alcoholic Beverage Control Law in a manner inconsistent with its order. Defendants-appellants appealed.

AFFIRMED in part, REVERSED and REMANDED in part.

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WESLEY, *Circuit Judge*:

On December 6, 1933, the New York Times declared that "[p]rohibition of alcoholic beverages as a national policy ended at 5:32 ½ p.m. Eastern Standard Time" when Utah became the thirty-sixth state to ratify the Twenty-first Amendment. *Final Action at Capital,* N.Y. TIMES, Dec. 6, 1933, at 1. Utah had seen fit to delay its vote so that it might have the "honor" of ending the Prohibition era – Pennsylvania and Ohio had ratified the Amendment earlier that day. As the nation prepared to return to the legal use of alcohol, extra quotas of Canadian whiskies were made ready at the border while leaders of the Anti-Saloon League lamented that the sponsors of repeal would have to accept responsibility for the "evils of liquor." *Id.* at 2. The noble experiment, as President Hoover had called it, was at an end.

The Twenty-first Amendment is unequaled in our constitutional experience – it repeals one constitutional provision and creates an exception to another. The Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process. The Amendment brought an end to Prohibition while reaffirming the states' power to control the delivery or use of alcohol within their borders. Section 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or

use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend XXI, § 2. The language of this simple and straightforward amendment has not changed in the last seventy years. But the jurisprudence that gives the Amendment its life and effect has changed its sweep.

This case requires us to reconcile the competing demands of the Twenty-first Amendment's grant of authority to the states to regulate the intrastate traffic of alcohol, with the power reserved to Congress under the Commerce Clause "[t]o regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3. Thus, we must determine whether New York's alcohol regulatory regime, insofar as it relates to the direct shipment of wine to New York consumers, is properly within the scope of section 2 of the Twenty-first Amendment, such that it is exempted from "the normal operation of the Commerce Clause," or more precisely, the dormant Commerce Clause. *Craig v. Boren,* 429 U.S. 190, 206 (1976). We conclude that the challenged regime is within the ambit of the Twenty-first Amendment and also does not violate the Privileges and Immunities Clause. We hold, however, that section 102(1)(a) of the State's regulatory regime violates the First Amendment insofar as it prohibits all commercial speech pertaining to the sale of alcoholic beverages directed to New York consumers by unlicensed entities.

BACKGROUND

A. New York's Regulatory Regime

Shortly following the ratification of the Twenty-first Amendment, New York, like most states, adopted a three-tiered system for the sale and distribution of alcoholic beverages. *See* N.Y. Alco. Bev. Cont. Law § 100(1) (McKinney

2000). One of the fundamental principles of the system is that all sales of alcohol within New York must be made to or by state-licensed entities. To this end, section 100(1) of New York's Alcoholic Beverage Control Law (the "ABC Law") provides that "[n]o person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter." *Id.* Section 102(1)(c) of the ABC Law also provides in relevant part that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages."[1] *Id.* In addition, the ABC Law prohibits a common carrier or any other person from bringing or carrying any alcoholic beverages into the state "unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." *Id.* § 102(1)(d).

Generally, the license application process is rigorous to ensure that only reputable individuals and their companies enter the alcoholic beverage trade. Applicants must identify any person with an interest in the business along with the sources of funds used in the licensed business. *Id.* § 110(1)(g). Licensees must also post an appropriate penal bond that may be subject to forfeiture for violation of the ABC Law or State Liquor Authority ("SLA") regulations. *Id.* § 112; N.Y. Comp. Codes R. & Regs. tit. 9, §§ 81.1-81.7 (2003). A conviction for a felony or certain misdemeanors

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[1] There are exceptions for alcoholic beverages purchased for personal use while outside the United States for at least forty-eight consecutive hours. *See* N.Y. Alco. Bev. Cont. Law § 102(1)(c) (McKinney 2000).

precludes a person from obtaining a license, N.Y. Alco. Bev. Cont. Law § 126(1) (McKinney 2000), and any person who commits a violation of the ABC Law cannot obtain a license for a period of two years. *Id.* § 126(5). Additionally, licensees must maintain adequate books and records on their premises and make them available for inspection by the SLA. *Id.* §§ 103(7), 104(10), 105(15), 106(12). These requirements facilitate the SLA's role in generating and collecting tax revenue, and in ensuring that licensees comply with the provisions of New York's regulatory scheme.

Section 76 of the ABC Law sets forth the requirements for obtaining a New York winery license. As defined under the ABC Law, a licensed winery is one that has paid the required licensing fee, *id.* § 76, and "has and maintains a branch factory, office or storeroom within the state of New York and receives wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state." *Id.* § 3(37).[2] Licensed wineries enjoy important privileges in New York's regulatory scheme. For example, a licensed winery may sell and ship its wine to another licensed winery, a wholesaler or a retailer. *Id.* § 77(1). More importantly, however, a licensed winery may also obtain a retail license, allowing it to sell

[2] Smaller New York wineries can obtain a farm winery license at a lower fee. N.Y. Alco. Bev. Cont. Law § 76-a (McKinney 2000). A licensed farm winery can manufacture no more than 150,000 finished gallons of wine annually, *id.* § 76-a(7), and must use New York-grown grapes or other fruits in the manufacturing process. *Id.* § 76-a(5). Like other licensed wineries, a licensed farm winery may sell and ship its wine to a licensed winery, wholesaler or retailer, or directly to consumers. *Id.* §§ 76-a(3), (6)(d).

and ship its wines directly to consumers. *Id.* §§ 76(4), 77(2). Thus, unlike in other states,[3] out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol. They must, however, comply with the licensing requirements of the ABC Law, including establishing and maintaining a physical presence in New York.

B. Decision Below

Plaintiffs-appellees, Juanita Swedenburg and David Lucas, proprietors of two out-of-state wineries, and Patrick Fitzgerald, Cortes DeRussy and Robin Brooks, New York wine consumers, filed this action against New York State seeking a declaration that sections 102(1)(a), (c) and (d) of New York's ABC Law are facially unconstitutional under the Commerce Clause, the Privileges and Immunities Clause, and the First Amendment. Plaintiffs-appellees claim sections 102(1)(c) and (d) violate the dormant Commerce Clause because they prevent the winery plaintiffs-appellees from shipping their wine products directly to New York consumers. The wineries contend that based on their size – Swedenburg estimates New York sales of only 120 to 180 bottles of wine a year – direct sales to consumers through a website or the mail are their only possible access to the New York market. Thus, plaintiffs-appellees

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[3] *See* Fla. Stat. ch. 561.221 (2003); N.C. Gen. Stat. § 18B-102.1 (2003); Tex. Alco. Bev. Code Ann. § 107.07 (2003); *see also Heald v. Engler*, 342 F.3d 517, 521 (6th Cir. 2003) ("[R]eading a number of provisions in conjunction with each other . . . at present, there is no procedure [in Michigan] whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents.") (internal quotation marks omitted).

argue the licensing scheme provides an unconstitutional advantage to in-state wineries and is not "saved" by the Twenty-first Amendment. They also contend that section 102(1)(a) impermissibly bans out-of-state purveyors from soliciting orders from New York consumers, thereby violating the First Amendment.

State defendants and intervening defendants, wholesale distributors of alcohol, (collectively, "defendants-appellants"), argue that the regulatory scheme operates even-handedly with respect to in-state and out-of-state interests, and thus does not improperly discriminate against out-of-state wineries. Defendants-appellants further argue that, in any event, the regulatory scheme is excepted from dormant Commerce Clause scrutiny, as it is a proper exercise of the State's authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol for delivery or use within its borders.

Defendants-appellants moved to dismiss the complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), but the district court denied the motion. After discovery, the parties cross-moved for summary judgment. The district court granted plaintiffs-appellees' motion. *See Swedenburg v. Kelly,* 232 F. Supp. 2d 135 (S.D.N.Y. 2002). Relying on the method of analysis utilized by a number of other federal courts in similar challenges, the district court first found that the New York regime directly discriminated against interstate commerce. *Id.* at 145. The court then held that the ban on direct shipment of out-of-state wine by non-licensed wineries did not "implicate the

State's core concerns under the Twenty-first Amendment," and thus, the ban was not insulated from a dormant Commerce Clause attack. *Id.* at 148.[4]

The court rejected the State's contention that the "presence" requirement of the statute cured its alleged discriminatory effect. "It appears unreasonable to this Court to require that an out-of-state winemaker 'become a resident in order to compete on equal terms.'" *Id.* at 146 (quoting *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72 (1963)). The district court noted that the Supreme Court has viewed with substantial suspicion state statutes requiring that business operations be performed in the regulating state that could more efficiently be performed elsewhere. *Id.* With regard to the First Amendment claim, the court held that "[h]aving concluded that New York's ban on direct shipment of wine into the state is unconstitutional, Section 102(1)(a) may similarly, going forward, be read to prohibit lawful solicitations on behalf of out-of-state wineries – and needs to be revised." *Id.* at 152.

After further submissions and oral argument by the parties, the court entered judgment enjoining State defendants-appellants from enforcing section 102(1)(c) and (d) in a manner that "would prohibit (i) the winery plaintiffs from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries and (ii) the consumer plaintiffs from receiving

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[4] In light of its decision on the Commerce Clause claim, the court found it unnecessary to reach appellees' Privileges and Immunities Clause claim. *Id.* at 152.

wines shipped directly to them from out-of-state wineries on the same terms and conditions applicable to consumers of New York wineries."[5] *Swedenburg v. Kelly*, No. 00-0778 (S.D.N.Y. Dec. 12, 2002). The court further enjoined State defendants-appellants from enforcing section 102(a) "against the winery plaintiffs in a manner that would prevent them from conveying lawful information to New York consumers on the same terms and conditions applicable to New York wineries." *Id.*

State defendants and intervenor-defendants appealed.

DISCUSSION

I. CONSTITUTIONALITY OF THE REGULATORY SCHEME UNDER THE TWENTY-FIRST AMENDMENT

A. Analytical Framework

We do not approach this case with a blank slate. Five other circuits have decided similar cases; a common thread runs throughout.[6] Each challenged a state regulatory scheme that prohibited out-of-state wineries from importing and selling wine directly to consumers, but permitted local wineries to avoid the three-tier distribution system

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[5] State-defendants argued the appropriate remedy was to strike the provisions that allow licensed wineries to sell directly to consumers. *Cf. Beskind v. Easley*, 325 F.3d 506, 517-20 (4th Cir. 2003).

[6] *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000); *see also Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wash. 2d 98 (2003) (considering the constitutionality of a statutory exemption for in-state wineries).

with direct sales to consumers. Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, similar to that used by the district court here, in which the statute is first examined in the context of the dormant Commerce Clause. *Heald v. Engler,* 342 F.3d 517, 524 (6th Cir. 2003); *Dickerson v. Bailey,* 336 F.3d 388, 400 (5th Cir. 2003); *Beskind v. Easley,* 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner,* 311 F.3d 1104, 1108 (11th Cir. 2002). Under traditional dormant Commerce Clause analysis, a state regulation is unconstitutional if it "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local gains." *Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200, 208 (2d Cir. 2003) (internal quotation marks and citations omitted); *see also Freedom Holdings, Inc. v. Spitzer,* No. 02-7492, slip op. 7299, 7316-26 (2d Cir. Jan. 6, 2004). In each of the four circuit court cases, the regulatory scheme at issue was found to be facially discriminatory in violation of the dormant Commerce Clause. *Heald,* 342 F.3d at 525; *Dickerson,* 336 F.3d at 402-03; *Beskind,* 325 F.3d at 515; *Bainbridge,* 311 F.3d at 1109-11. Notwithstanding a finding that the regulatory scheme violates the dormant Commerce Clause, the statute can be "saved" by the Twenty-first Amendment in the second step, but *only if* it advances one of the Amendment's "core concerns." Under this two-tier analysis, none of the state statutes regulating the importation of alcohol were saved by the Twenty-first Amendment core concern examination. *See Heald,* 342 F.3d at 526-27; *Dickerson,* 336 F.3d at 403-07; *Beskind,* 325 F.3d at 516-17; *Bainbridge,* 311 F.3d at 1111-15. We think this two-step approach is flawed because it has the effect of unnecessarily limiting the authority

delegated to the states through the clear and unambiguous language of section 2.[7]

A second mode of analysis recognizes that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," and considers each "in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). In this vein, the second mode of inquiry considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause. *See Craig*, 429 U.S. at 206. We adopt this approach acknowledging that only one other circuit court has employed it in a similar case. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (upholding an Indiana statute restricting the direct shipment of wine on the ground that it was a permissible expression of the state's authority under section 2 of the Twenty-first Amendment). The inquiry, in our view, should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment. Instead, the inquiry should be sensitive to the manner in which these two constitutional forces

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[7] Although we disagree with the analytical paradigm employed, we need not assess the other circuits' determinations, as the statutes challenged in those cases were significantly different from the regulatory regime at issue here. We note, however, that the Fourth Circuit offered a possible nondiscriminatory alternative to North Carolina's statute that is remarkably similar to the New York scheme. *See Beskind*, 325 F.3d at 516.

interact in light of the impact the Twenty-first Amendment has on dormant Commerce Clause concerns.

B. The Legal History of the Twenty-first Amendment

While the language of section 2 is clear, it is helpful to understand the jurisprudential and statutory context of its birth. Prior to the Eighteenth Amendment and nationwide prohibition of alcohol, many states attempted to ban the production and consumption of alcohol, but found their efforts thwarted by Supreme Court decisions invoking the doctrine now known as the dormant Commerce Clause. *See, e.g., Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 481, 493-94 (1888) (invalidating under the dormant Commerce Clause a state law restricting the importation of liquor to those possessing a permit); *Leisy v. Hardin*, 135 U.S. 100 (1890) (holding that, even after importation, liquor contained in its original package remained an article of interstate commerce, subject to federal Commerce Clause authority). As a result of the Court's decisions, "dry" states found themselves in the unenviable position of being able to prohibit consumption of domestic liquor but helpless to stop the importation of liquor from outside their borders. *See Bridenbaugh*, 227 F.3d at 852 (recounting pre-Prohibition jurisprudence).

Congress reacted by enacting the Wilson Act, ch. 728, 26 Stat. 313 (1890), which gave states the authority to regulate imported liquor "*to the same extent and in the same manner* as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." *Id.* (emphasis added). The Wilson Act's language signaled Congress' intent to allow

states to regulate imported alcohol in the same manner as domestically produced alcohol.

The Supreme Court, however, narrowly construed the Wilson Act, permitting states to regulate the resale of imported liquor in its original package, but preventing the regulation of direct shipments to in-state consumers by out-of-state distributors. *Rhodes v. Iowa,* 170 U.S. 412, 423-25 (1898). Congress responded with the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913), which prohibited "the shipment or transportation, in any manner or by any means whatsoever, of any . . . liquor of any kind, from one State . . . into any other State which . . . is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State. . . ." *Id.* The Act's broad language ensured that dry states had the authority to prevent the importation of alcohol across their borders. By the time the Supreme Court upheld the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Railway Co.,* 242 U.S. 311 (1917), the temperance movement had gained considerable ground throughout the nation. And in 1919, the Eighteenth Amendment set the nation on a course of national prohibition and ended the states' legal struggle to regulate alcohol.

The ratification of the Twenty-first Amendment did not return the Constitution to its pre-1919 form. Most states wished to control alcohol use within their borders. Accordingly, the language of section 2 of the Twenty-first Amendment, "closely follow[ed] the [language of] the Webb-Kenyon and Wilson Acts," *Craig,* 429 U.S. at 205-06, thereby prohibiting "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in

violation of the laws thereof." U.S. Const. amend. XXI, § 2. Section 2 effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state.

Because section 2 speaks directly to the importation of liquor into the state, dormant Commerce Clause jurisprudence could no longer be employed to insulate interstate shipments of liquor from state regulation, as almost "[*e*]*very* use of § 2 could be called 'discriminatory' in the sense that . . . every statute limiting [interstate] importation leaves intrastate commerce unaffected." *Bridenbaugh*, 227 F.3d at 853 (emphasis in original). Allowing dormant Commerce Clause concerns to restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity.

C. Analysis

Section 2 of the Twenty-first Amendment grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). This constitutional grant of authority should not, we think, be subordinated to the dormant Commerce Clause inquiry when the two provisions conflict, as they do here. Plaintiffs-appellees argue that the scope of section 2's grant of authority to the states has been narrowed by a series of Supreme Court decisions. The end result, they posit, is that a state law regulating the importation of interstate liquor is a proper exercise of the state's section 2 power only if it regulates in a non-discriminatory manner

and is intended to advance the "core concerns" of the Twenty-first Amendment – namely temperance, the promotion of orderly market conditions, and revenue production. *See North Dakota v. United States,* 495 U.S. 423, 432 (1990) (plurality opinion).

We disagree with the proposition that the Supreme Court's Twenty-first Amendment jurisprudence confines the scope of section 2 to state regulations that advance so-called core concerns. In our view, although the Supreme Court's Twenty-first Amendment jurisprudence has to some degree cabined the scope of section 2, it has done so only insofar as it has limited section 2's grant of authority to its plain language. That is, the Supreme Court has consistently recognized only that, under section 2, a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate *beyond* the state's borders or to preserve fundamental rights.[8]

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[8] *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996) (holding that the Twenty-first Amendment does not grant the states authority to regulate in violation of the First Amendment); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573 (1986) (holding that the Twenty-first Amendment does not confer upon the states authority to regulate alcohol prices in other states); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984) (holding that the Twenty-first Amendment does not provide states with the authority to regulate to the detriment of the federal interest in maintaining a national marketplace); *Craig v. Boren,* 429 U.S. 190 (1976) (holding that the Twenty-first Amendment does not grant the states authority to regulate in violation of the Equal Protection Clause); *Dep't of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964) (holding that the Twenty-first Amendment does not grant the states power to intrude upon the federal interest in regulating foreign alcohol imports); *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964) (holding that the Twenty-first

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1. *Early Twenty-first Amendment Jurisprudence*

In the years immediately following the Twenty-first Amendment's ratification, the Supreme Court recognized the Amendment's extensive delegation of authority to the states. In *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), a unanimous Court upheld a California statute that imposed a licensing fee for the privilege of importing beer into the state against a dormant Commerce Clause challenge raised by a group of out-of-state beer importers. In so doing, the Court acknowledged that, "[p]rior to the Twenty-First Amendment it would . . . have been unconstitutional" to impose the challenged licensing fee. *Id.* at 62. The Twenty-first Amendment, however, "confer[red] upon the state the power to forbid all importations which do not comply with the conditions which it prescribes." *Id.*

Two years later, the Court, again unanimously, upheld a Minnesota statute that clearly discriminated against imported liquors by imposing an alcohol-content requirement not imposed on domestically-produced liquors. *See Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938). The Court noted that "under the amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic." *Id.* at 403; *see also Ziffrin v. Reeves*, 308 U.S. 132 (1939).

These early cases established that section 2 provided the states with the authority to enact legislation for the regulation of alcohol traffic within its borders, even where

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Amendment does not grant states the authority to intrude upon the federal interest in regulating foreign commerce).

those regulations operated to the disadvantage of out-of-state interests. Although some courts – including our sister circuits – appear to have distanced themselves from these early cases,[9] they have never been overruled.

2. *Contemporary Twenty-first Amendment Jurisprudence*

We acknowledge that more recent cases have recognized that the Twenty-first Amendment is not a plenary grant of authority to states to regulate all activity involving alcohol. As the Supreme Court has noted, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig*, 429 U.S. at 206 (considering the impact of the Twenty-first Amendment on an Equal Protection challenge to a state law prescribing different drinking ages for males and females); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (considering the impact of the Twenty-first Amendment in the context of a First Amendment challenge to a state statute prohibiting advertisement of liquor prices). Section 2's grant of authority to the state to regulate alcohol within its borders could not sustain state statutes that violated individual liberties protected by other constitutional provisions.

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[9] *See, e.g., Heald*, 342 F.3d at 522 (finding Michigan's reliance on these cases "disingenuous at best"); *Dickerson*, 336 F.3d at 406 (relying on more recent Twenty-first Amendment jurisprudence in determining the constitutionality of Texas' regulatory regime); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (noting that more recent Twenty-first Amendment jurisprudence has confirmed that section 2 does not grant the states plenary authority to regulate alcohol).

Similarly, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court struck down New York's attempt to prohibit the sale of liquor to internationally-bound travelers at a duty-free airport shop operating under the supervision of the United States Bureau of Customs. *Id.* at 329. In so holding, the Court rejected the view that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Id.* at 331-32. Such a view, the Court declared, would effectively strip Congress of its "regulatory power over interstate or foreign commerce in intoxicating liquor." *Id.* at 332. The *Idlewild* Court distinguished the earlier Twenty-first Amendment cases, such as *Young's Market, Mahoney,* and *Ziffrin,* on the ground that, in those cases, liquor was being imported and distributed *into* the state's territory, and thus, the challenged statutes permissibly regulated the *intrastate* traffic of alcohol. *Id.* at 330-31. In contrast, the alcoholic beverages that New York sought to regulate in *Idlewild* were held on federal property and were intended for overseas sale. In light of these considerations, the Court determined that New York's authority, under the Twenty-first Amendment, to regulate the flow of alcohol within its borders was not implicated by the facts in *Idlewild. Id.* at 333.

In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court invalidated a state law seeking to impose a tax on alcohol imported from Scotland on the ground that it violated the Constitution's Export-Import Clause. *Id.* at 346. The Court reiterated it had "no doubt" that Kentucky could regulate alcohol "destined for distribution, use, or consumption within its borders." *Id.* Section 2, however, did not give the state the power to

impose a tax "clearly of a kind prohibited by the Export-Import Clause." *Id.* at 343. In both *Idlewild* and *James B. Beam Distilling,* the point of differentiation from the *Young's Market* line of cases was the fact that in the earlier cases, the state's regulatory efforts were confined to the interstate importation and intrastate distribution of alcohol, and therefore did not impermissibly intrude on regulatory powers reserved to the federal government.

Two decades after *Idlewild* and *James B. Beam Distilling,* the Court reemphasized the view that the Twenty-first Amendment is not without limits when a state regulatory scheme conflicts with valid federal concerns. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), the Court, upon finding that a California wine-pricing program violated the Sherman Act, considered whether section 2 "permit[ted] California to countermand the congressional policy – adopted under the commerce power – in favor of competition." *Id.* at 106. Ultimately, the Court concluded that because federal antitrust concerns animating the Sherman Act outweighed California's desire to protect small liquor retailers from predatory pricing schemes of larger retailers, section 2 could not salvage the offending statute. *Id.* at 114. Four years later, in *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984), the Court echoed *Midcal*'s refrain, holding unconstitutional an Oklahoma statute that required in-state television operators to delete advertisements for alcoholic beverages contained in the out-of-state signals that they retransmitted by cable to Oklahoma subscribers. In striking down the law, the Court reiterated that the Twenty-first Amendment had not repealed the Commerce Clause, and declared that when a state statute does not directly regulate the sale or use of

liquor within the state's borders, a conflicting exercise of federal authority may prevail. *Id.* at 713.

The Supreme Court has also viewed with caution state attempts to invoke section 2 as a pretext for economic protectionism. In *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), Hawaii imposed an excise tax on liquor sales at wholesale, while exempting certain locally produced alcoholic beverages. The Court invalidated the Hawaiian tax on the grounds that it was intended to "favor local liquor industries," and therefore was preempted by "strong federal interests in preventing economic Balkanization" and promoting a unified national market.[10] *Id.* at 276. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573 (1986), the Court

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[10] Regrettably, *Bacchus* is offered as requiring the two-step analysis employed by four of the circuits. *See Heald,* 342 F.3d at 523-24; *Dickerson,* 336 F.3d at 400; *Beskind,* 325 F.3d at 514; *Bainbridge,* 311 F.3d at 1108. We are hard pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template in analyzing the New York statute now before us. *Bacchus* initially analyzed the Hawaiian tax scheme in terms of the dormant Commerce Clause because Hawaii defended the tax as having no effect on interstate commerce. Hawaii did so by arguing that the volume of sales of the two local beverages was exceptionally small. Thus, the state argued its attempt to help some, but not all, local beverages did not hurt sales of other beverages produced in Hawaii or elsewhere. *See Bacchus,* 468 U.S. at 268-69. After rejecting that argument, the Court then went on to address an argument Hawaii advanced for the first time at the Court – one based on section 2 of the Twenty-first Amendment. The Court rejected Hawaii's belated effort to save the tax. It noted that the purpose of the tax was to stimulate a local industry, not to regulate the use and distribution of alcohol. *See id.* at 274-76. We find nothing in the Supreme Court's opinion that dealt with Hawaii's arguments in seriatim that requires us to transpose the resolution of one case into an analytical model for all.

struck down a New York statute that required state-licensed distillers to comply with a price schedule that established prices for local liquor sales no higher than the lowest price the distiller charged in other states. The Court recognized that the statute could, in effect, control the prices of alcoholic beverages in neighboring states. *Id.* at 582-84. Thus, the Court concluded that the statute was an impermissible extraterritorial attempt to regulate liquor prices. *Id.* at 585; *see also Healy v. Beer Inst.*, 491 U.S. 324, 342 (1989) (affirming *Brown-Forman*'s holding that "the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other States").

In each of these cases, the Supreme Court was called upon to resolve competing claims of constitutional authority. In each, the Court "limited" the scope of section 2 only insofar as it related to a state's attempt to regulate the traffic of alcohol outside of its borders or in violation of other powers reserved to the federal government. However, in each case, the Court unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders it "primarily created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206.[11] The Supreme

[11] *Accord, Healy*, 491 U.S. at 342 (noting that section 2 authorizes state regulation of intrastate liquor traffic, and thus does not permit state laws that attempt to prescribe prices for out-of-state liquor sales); *Brown-Forman*, 476 U.S. at 585 ("Section 2 of the Twenty-first Amendment . . . speaks only to state regulation of the transportation or importation into any State . . . for delivery or use therein of alcoholic beverages.") (internal quotation marks omitted); *Bacchus*, 468 U.S. at

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Court has neither held nor implied that laws prescribing regulations for the importation and distribution of alcohol within a state's borders "are problematic under the dormant commerce clause." *Bridenbaugh*, 227 F.3d at 853. Indeed, as the language of the Amendment and the Court's jurisprudence amply demonstrate, section 2's powers are directed specifically towards intrastate regulation and traffic of liquor.

This limited interpretation of section 2 is consistent with the political and cultural forces animating Prohibition and its subsequent repeal by the Twenty-first Amendment. That is, the impact of the dormant Commerce Clause has always been an issue relating to state efforts to regulate the flow of liquor within its borders. Following a series of federal statutory efforts to provide states with the legal wherewithal to regulate intrastate alcohol traffic, the Eighteenth Amendment prohibited the flow of alcohol on a national level. With Prohibition's repeal, the drafters of the Twenty-first Amendment crafted section 2 to allow states the authority to circumvent

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282 (noting "we have consistently reaffirmed that understanding of the Amendment, repeatedly acknowledging the broad nature of state authority to regulate commerce in intoxicating liquors"); *Midcal*, 445 U.S. at 110 (acknowledging that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" within the state); *Capital Cities Cable, Inc.*, 467 U.S. at 713 (noting that "the core § 2 power" concerns the regulation of alcohol within the state's borders); *James B. Beam Distilling Co.*, 377 U.S. at 344 ("[B]y virtue of [section 2 of the Twenty-first Amendment] a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.") (internal quotation marks omitted); *Idlewild*, 377 U.S. at 330 (same).

dormant Commerce Clause protections, provided that they were regulating the intrastate flow of alcohol.

3. *New York's Regulatory Regime*

New York's regulatory regime falls squarely within the ambit of section 2's grant of authority. The statutory scheme regulates only the importation and distribution of alcohol in New York. New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests. The statute allows the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the SLA.

Although we are sensitive to the Supreme Court's instruction that "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as law enacted to combat the perceived evils of an unrestricted traffic in liquor," *Bacchus,* 468 U.S. at 276, we find no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests. All wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state. Wine that is delivered to a branch office or warehouse can then be shipped directly to consumers.

Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by SLA officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license

holders are required to post. New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol.

We fully recognize that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol. When a state statute, whether on its face or in effect, discriminates against interstate commerce, it is virtually per se invalid unless the State can justify the discrimination "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 353 (1977).

Here, the requirement that all wine be shipped through a New York warehouse is a precondition to direct consumer sales. We recognize that "state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere . . . ha[ve] been declared to be virtually per se illegal." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 145 (1970); *see also C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994); *South-Cent. Timber Dev. v. Wunnicke,* 467 U.S. 82 (1984). But business efficiency must give way to valid regulatory concerns in this unique area of commerce. Under this scheme, out-of-state wineries will incur some costs in establishing and maintaining a physical presence in New York, costs not incurred by in-state wineries. These effects, however, do not alter the legitimacy of section 2's delegation of authority. While it may be an additional expense for out-of-state wineries to be present in New

York, they gain access to a market not available to others – direct sales to consumers. The fact that some out-of-state wineries will have greater costs than others (out-of-state or in-state) in accessing the market is not determinative.[12] New York has chosen to relax its regulatory grip for wineries to sell directly to consumers. It has not barred out-of-state wineries from the opportunity; it has correlated its relaxation of regulatory scrutiny with a safety net ensuring accountability – presence. *See Milton S. Kronheim & Co. v.. District of Columbia,* 91 F.3d 193, 204 (D.C. Cir. 1996).

New York's desire to ensure accountability through presence is aimed at the regulatory interests directly tied to the importation and transportation of alcohol for use in New York. *See North Dakota,* 495 U.S. at 432 (plurality opinion) ("In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate."). All wine will pass through a warehouse located in New York, allowing state officials access to the product. As noted above, every licensee must

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[12] Appellees did present some evidence of a general nature with regard to projected costs that an out-of-state winery would incur in obtaining a New York license. They argue those projected costs justify their decision not to pursue a New York license. We find those projections to be of little use, and they are certainly not determinative. Appellees do not contend the requirements for licensing are somehow arbitrary or unrelated to the state's desire to regulate the industry. They simply argue the costs are too high to warrant entry into the market.

maintain books and records on premises available for inspection at any time by the SLA.

In 2000, there were over 2,100 wineries in the country, a 275% increase since 1975. Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless.[13] Section 2 does not require that New York bear the burden in attempting to ensure proper compliance with its tax and regulatory system regarding imported wine. New York's "motives of legitimate state interests which would be promoted by requiring [physical presence], *e.g.*, auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits, etc., fall [] . . . squarely within the state's core enforcement powers over alcohol." *Kronheim*, 91 F.3d at 203-04 (internal quotation marks and citation omitted).

The winery plaintiffs presented compelling proof that boutique wineries with limited production of high quality wine have a niche in an increasingly sophisticated national market of wine connoisseurs. Facility of travel and the Internet have made wineries all over the nation available to those wishing to visit and buy wine – personally or in a virtual sense. Indeed, a majority in both houses of New York's legislature felt that New York wineries (the vast majority of which are quite small) would benefit from a reciprocity statute that would allow direct sales to

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[13] The recently enacted Twenty-first Amendment Enforcement Act, while helpful to states, can only be used after a violation occurs. *See generally* 27 U.S.C. § 122a. Under section 2, states have the authority to be proactive as well as reactive.

consumers by unlicensed out-of-state wineries from states allowing New York wineries the same opportunity. *See* S. 3533-A, A-7411, 1995 Senate-Assembly Bill (NY 1995). The governor chose to veto the bill. *See* Governor's Veto #76 (NY 1995). Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment. If New York wishes to further relax its regulatory control of the flow of wine into New York, it can do so.

We hold that the challenged regulatory scheme is within the ambit of the powers granted to states by the Twenty-first Amendment. New York's regulatory scheme allows licensed wineries, whether in-state or out-of-state, direct access to a market of sophisticated oenophiles. The scheme does so in a non-discriminatory manner, while targeting valid state interests in controlling the importation and transportation of alcohol. Accordingly, we conclude that New York has acted within its authority under the Twenty-first Amendment.

II. Constitutionality of the Regulatory Scheme Under the Privileges and Immunities Clause

Plaintiffs-appellees also argue New York's statutory scheme violates the Privileges and Immunities Clause, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. For purposes of this clause, "the terms 'citizen' and 'resident' are used interchangeably." *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 279 n.6 (1985). As we have discussed above, the statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents. *Cf. Supreme*

Court of Virginia v. Friedman, 487 U.S. 59, 70 (1988) (invalidating a Virginia Supreme Court rule permitting Virginia residents entrance to the state bar without an examination). Accordingly, we find that the regulatory scheme does not violate the Privileges and Immunities Clause.[14]

III. Constitutionality of Section 102(1)(a) Under the First Amendment

Finally, plaintiffs-appellees challenge the constitutionality of section 102(1)(a), which provides:

> No person shall send or cause to be sent into the state any . . . publication of any kind containing *an advertisement or a solicitation of any order for any alcoholic beverages*, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, *unless such person shall be duly licensed.*

N.Y. Alco. Bev. Cont. Law § 102(1)(a) (McKinney 2000) (emphasis added). In the district court, plaintiffs-appellees argued that section 102(1)(a) was unconstitutionally overbroad in violation of the First Amendment. The district court agreed, but only after deciding that sections 102(c) and (d) were unconstitutional. *See Swedenburg*, 232 F. Supp. 2d at 152. On appeal, plaintiffs-appellees maintain that this section is unconstitutionally overbroad,

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[14] Appellees who are New York citizens do not have standing to challenge the regulatory regime under the Privileges and Immunities Clause. *See Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982).

independent of the constitutional status of sections 102(c) and (d). We agree with plaintiffs-appellees that the statute is overbroad and violates the First Amendment.

It is well established that states may prohibit commercial speech concerning unlawful activity. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). If, however, commercial speech concerns lawful activity and is not misleading, courts must then look to whether there is a substantial governmental interest in prohibiting the commercial speech at issue. *Id.* at 566. If the government has identified a substantial interest in regulating the speech, courts "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* The state "carries the burden of showing that the challenged regulation advances [its] interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (internal quotation marks and citation omitted).

New York contends that the SLA interprets section 102(1)(a) narrowly to prohibit only unlawful activity – "the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed producers or sellers." In so doing, the State argues, SLA's interpretation prohibits only the advertising of unlawful activity, and thus does not run afoul of the First Amendment.

An agency's interpretation of a statute it is charged to administer deserves broad deference when the interpretation has been adopted in a rule-making or other formal proceeding. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Here, however, the State relies only on an affidavit submitted in this litigation as an expression of

the agency's view. This Court has held that an opinion letter or a position taken in the course of litigation is entitled to deference only to the extent that it is persuasive. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001). Here, we find the State's affidavit unpersuasive.

Section 102(1)(a) plainly encompasses a broader prohibition than the solicitation of orders by unlicensed, out-of-state wineries for direct shipment of wine to New York consumers. The statute's broad language prohibits unlicensed persons from causing *any* publication to enter the state that contains an "advertisement or a solicitation of any order for any alcoholic beverages." N.Y. Alco. Bev. Cont. Law § 102(1)(a) (McKinney 2000). While the state can limit illegal sales of alcohol, section 102(1)(a) broadly encompasses protected speech. For example, if plaintiffs-appellees' wineries advertised on the Internet and included an order form that is lawful in their own states, the advertisement would be illegal in New York, even if it contained language limiting sales to states in which such orders were lawful. Under the broad terms of section 102(1)(a), the limitation would be insufficient, as the statute prohibits *any* advertising activity by unlicensed wineries.

The State's efforts to defend section 102(1)(a) on the ground that it is narrowly interpreted are unavailing.[15] "[T]he Twenty-first Amendment does not qualify the

[15] New York has not argued that it has a substantial interest in limiting advertising of wines in general, or that the prohibition advances any potential interest such as temperance.

constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *44 Liquormart*, 517 U.S. at 516. Accordingly, we hold that, in impermissibly regulating protected commercial speech, section 102(1)(a) is overbroad and impermissibly violates the First Amendment.

CONCLUSION

The district court's order of December 12, 2002, is hereby AFFIRMED in part and REVERSED in part and the matter remanded for further proceedings in accordance with this opinion.

JUANITA SWEDENBURG, in her own capacity and as Proprietor of SWEDENBURG WINERY, a Virginia Partnership; DAVID LUCAS, in his own capacity and as Proprietor of THE LUCAS WINERY, a California sole Proprietorship; PATRICK FITZGERALD; CORTES DeRUSSY; and ROBIN BROOKS, Plaintiff, -against- EDWARD F. KELLY, Chairman, and LAWRENCE J. GEDDA and JOSEPH ZARRIELLO, Commissioners, of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities, Defendants, -and- CHARMER INDUSTRIES, INC., PEERLESS IMPORTERS INC., EBER BROTHERS WINE & LIQUOR CORP., PREMIER BEVERAGE COMPANY LLC, METROPOLITAN PACKAGE STORE ASSOCIATION, INC., LOCAL 2D OF THE ALLIED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, and DR. CALVIN BUTTS, Intervenor-Defendants.

00 Civ. 0778 (RMB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

232 F. Supp. 2d 135; 2002 U.S. Dist. LEXIS 21841

November 12, 2002, Decided
November 12, 2002, Filed

COUNSEL: For Juanita Swedenburg, David Lucas, Patrick Fitzgerald, Cortes Derussy, Robin Brooks, PLAINTIFFS: Deborah Simpson, Institute for Justice, Washington, DC USA.

For Juanita Swedenburg, David Lucas, Patrick Fitzgerald, Cortes Derussy, Robin Brooks, PLAINTIFFS: Lance J Gotko, Friedman, Kaplan & Seiler LLP, New York, NY USA.

For Edward F Kelly, Lawrence J Gedda, Joseph Zarriello, DEFENDANTS: August L Fietkau, Eliot Spitzer, Attorney General of NYS, New York, NY USA.

JUDGES: RICHARD M. BERMAN, U.S.D.J.

OPINION BY: RICHARD M. BERMAN

OPINION:

DECISION AND ORDER

I. Introduction

This case is one of a series of recent constitutional challenges to state alcoholic beverage control laws, particularly as they relate to the direct shipment of wine. What the cases all have in common is the relationship (and tension) between the Commerce Clause of the United States Constitution, which empowers Congress to regulate commerce among the several states, and the Twenty-first Amendment to the Constitution, which grants to the states the power to regulate the importation and distribution of alcoholic beverages within their borders. **The Court concludes that the New York ban on the direct shipment of out-of-state wine is unconstitutional.**

On February 3, 2000, Plaintiffs Juanita Swedenburg ("Swedenburg") and David Lucas ("Lucas"), proprietors of two out-of-state wineries, and Patrick Fitzgerald ("Fitzgerald"), Cortes DeRussy ("DeRussy"), and Robin Brooks ("Brooks"), three New York State consumers of wine (collectively "Plaintiffs") filed an action against Defendants Edward F. Kelly ("Kelly"), Chairman of the New York State Liquor Authority, and Lawrence J. Gedda ("Gedda") and Joseph Zarriello ("Zarriello"), Commissioners of the New York State Liquor Authority,

requesting that the Court "declare . . . N.Y. Alco. and Bev. Cont. Law §§ 102(1)(a), (c), and (d) ["ABC Law"] . . . unconstitutional, void, and of no effect[.]"[1] Compl. at 10. Plaintiffs claim that "the Direct Shipment and Advertising Ban violates the rights of all the plaintiffs to freedom of commerce as guaranteed by the interstate commerce clause," *id.* ¶ 38, "the economic liberty of the plaintiffs Swedenburg and Lucas under the privileges and immunities guarantee," *id.* ¶ 46, and, "the right of the winery plaintiffs to produce, and of the consumer plaintiffs to receive, protected speech in violation of the First Amendment." *Id.* ¶ 54.

Defendants Kelly, Gedda, and Zarriello, as well as Intervenors Charmer Industries, Inc., Peerless Importers Inc., Eber Brothers Wine & Liquor Corp., Premier Beverage Company LLC, Metropolitan Package Store Association, Inc., Local 2d of The Allied Food and Commercial Workers International Union, and Dr. Calvin O. Butts (collectively "Defendants") filed a (joint) motion to dismiss the complaint on or about May 11, 2000, pursuant to

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[1] ABC Law § 102(1)(a) states that, "No person shall send or cause to be sent into the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind containing an advertisement or a solicitation of any order for any alcoholic beverages . . . unless such person shall be duly licensed hereunder to traffic in alcoholic beverages." Section 102(1)(c) provides that, "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages . . . " Section 102(1)(d) provides that, "No common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages. . . . " Section 130(3) makes violation of the N.Y. ABC Law a misdemeanor.

Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6). Plaintiffs, including amici Coalition to Preserve Consumer Access to Wine, Arcadian Estate Vineyards and Cascata Winery at the Professor's Inn, and Consumer Alert, opposed Defendants' motion.[2] Oral argument was held on July 21, 2000. By Decision and Order dated September 5, 2000 ("September 5, 2000 Decision"), the Court denied Defendants' motion to dismiss. **"No evidence has been presented here regarding the purpose(s) and effect(s) of New York's ABC Laws and it would be precipitous to make a determination foreclosing Plaintiffs' cause upon the existing record. At this stage, the Court is constrained to assume that a 'principal purpose of the Direct Shipment and Advertising Ban is economic protectionism [.]'"** *Swedenburg v. Kelly,* 2000 U.S. Dist. LEXIS 12758, 00 Civ. 778(RMB), 2000 WL 1264285, at *10 (S.D.N.Y. Sept. 5, 2000) (citing Compl. ¶ 36) (emphasis in original).

Discovery ensued, and on June 7, 2001, Plaintiffs moved for summary judgment pursuant to Fed. R. Civ. P. 56(c).[3] "The law is discriminatory on its face and burdens interstate commerce by making it all but impossible for many small wineries to sell their products to New York consumers." Plaintiffs' Memorandum of Law in Support of

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[2] On June 5, 2000, the Court also granted a letter application by the Coalition for Free Trade to participate as amicus.

[3] The evidence submitted by Plaintiffs generally has focused on the economic impact of the direct shipping ban, the ability of small out-of-state wineries to access the New York market, the economics of the current wine market and the legislative history of the New York ABC Laws. Defendants' evidence has tended to focus upon the utility of the three-tier system and its impact upon temperance and teen drinking.

Motion for Summary Judgment ("Pl. Mem.") at 2.[4] Defendants cross-moved for summary judgment on August 17, 2001, asserting that "state regulations . . . that prohibit shipments from out-of-state wineries to anyone other than in-state licensed wholesalers 'fall within the core of the State's power under [Section 2 of] the Twenty-first Amendment' and are 'unquestionably legitimate'."[5] Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Def. Mem.") at 2-3. Plaintiffs and Defendants filed reply briefs dated October 13, 2001 and November 13, 2001, respectively. *See* Pl. Reply; Def. Reply. Oral argument – which was enormously helpful to the Court – was held on April 17, 2002. Supplemental briefs

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[4] "[T]he federal Constitution empowers Congress 'to regulate Commerce . . . among the several states.' U.S. Const. Art. 1, § 8, cl. 3. The courts have interpreted the language of this provision affirmatively granting authority to Congress to regulate commerce as having a 'negative' aspect, designated the 'dormant' commerce clause, that implicitly establishes a national free market and restricts state and local governments from impeding the free flow of goods from one state to another." *Dickerson v. Bailey*, 87 F. Supp.2d 691, 693 n.2 (S.D. Tex. 2000) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 469-70, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992)); *see also Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 856 (S.D.N.Y. 1985), *aff'd sub nom., Loretto v. Duffy*, 761 F.2d 140 (1985) ("[t]he traditional principles underlying the [commerce] clause operate not only as a grant to Congress of power to regulate interstate commerce, but also as a restriction on the authority of the states to regulate interstate trade.")

[5] Section 2 of the Twenty-first Amendment of the U.S. Constitution states that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

were, thereafter, filed at the Court's request on April 19, 2002.[6]

II. Background[7]

Like other states, New York has a "three-tier" system of alcohol sales. Alcohol producers must go through licensed wholesalers and distributors who must, in turn, go through licensed retailers who then sell to consumers. *See* Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment,* 85 Va. L. Rev. 353, 355 (1999). All alcoholic beverages (not just wine) must be distributed through this three-tiered system. The ABC Law does not allow out-of-state wineries to ship their products directly to New York consumers. *See* N.Y. ABC Law § 102(1)(c).[8]

Plaintiffs, who are here concerned only about the distribution of wine, contend, *inter alia*, that the direct shipment ban violates both the Commerce Clause and the

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[6] By letter dated November 4, 2002, Defendants' counsel advised the Court that on November 2, 2002, President Bush signed into law the "Direct Shipping Statute" which allows customers of an out-of-state winery, under certain circumstances, to ship wine directly to the customers' home state. As noted by Plaintiff's counsel in his letter dated November 8, 2002, this new law does not affect the outcome of this case except, perhaps, to bolster the conclusion that direct shipment of wine is a viable alternative to its ban.

[7] A somewhat more detailed recitation of the facts, incorporated herein by reference, is presented in the Court's September 5, 2000 Decision. *See Swedenburg v. Kelly,* 2000 U.S. Dist. LEXIS 12758, 00 Civ. 778, 2000 WL 1264285 (S.D.N.Y. Sept. 5, 2000).

[8] Plaintiffs note that "prior to 1970, New York maintained a three-tier system for alcohol distribution, but the system permitted some direct shipments of wine," i.e. for personal use. Pl. Mem. at 16.

Privileges and Immunities Clause of the United States Constitution.[9] "New York's ABC Law on its face regulates interstate commerce and creates discriminatory burdens." Pl. Mem. at 12. Plaintiffs argue that Defendants' explanations of New York's direct shipping ban do not "justify the economic protectionism of [the law]." Pl. Reply at 7. Plaintiffs also contend that New York law "forbids certain advertising of lawful products and thereby deprives all plaintiffs of the free flow of communications guaranteed by the First Amendment." *Id.* at 3.

Defendants, as noted, rely principally upon the explicit language of the Twenty-first Amendment and assert "the State has acted within its 'core powers' . . . to regulate the 'transportation or importation' of alcoholic beverages for 'delivery or use' within the State." Def. Mem. at 6. They contend that "where, as here, a state regulation concerns 'whether to permit importation or sale of liquor and how to structure the liquor distribution system,' which is the 'central power reserved by § 2 of the Twenty-first Amendment,' that ends the inquiry." *Id.* at 7 (quoting *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 715, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984)).[10] Defendants further

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[9] The Privileges and Immunities Clause of Article IV, § 2 provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

[10] Defendants also contend that "there can be no violation of the 'dormant' Commerce Clause here because Congress recently passed the Twenty-first Amendment Enforcement Act ("Act") [106 Pub. L. 386] to support state bans on direct shipping." Def. Mem. at 12. The Court finds this argument unpersuasive because the Act merely authorizes a state attorney general to enforce state law "regulating the importation or transportation of any intoxicating liquor" in federal court, 27 U.S.C.

(Continued on following page)

contend that the New York Alcoholic Beverage Control "regime" advances and is premised upon legitimate state interests protected by the Twenty-first Amendment, including promoting temperance, ensuring orderly market conditions, and raising revenue. *Id.*[11] With respect to communications, Defendants assert that the ABC Laws includes a "narrowly tailored restriction on commercial advertising for alcoholic beverages . . . plainly aimed at preventing the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed suppliers." Def. Mem. at 29 (emphasis in original). In his November 4th letter, Defendants' counsel argues (incorrectly in the Court's view) that: "Congress has spoken on the direct shipment of wine, has struck the balance it deems appropriate, and has therefore removed the issue of state direct shipping bans from application of the 'dormant' Commerce Clause."

III. Standard of Review

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show . . . that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548

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§ 122a(b), and explicitly provides that it "shall not be construed to grant to States any additional power." 27 U.S.C. § 122a(e)(2).

[11] In fact, Defendants argue that New York's ABC Law does not violate the "dormant" Commerce Clause and that there is no need for the Court to assess whether the law is "saved" by the Twenty-first Amendment. Def. Mem. at 13-22.

(1986); *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1223 (2d Cir. 1994).

The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party which "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting Fed. R. Civ. P. 56(e)); *accord Brass v. American Film Technologies, Inc.*, 987 F.2d 142 (2d Cir. 1993). The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *see also Gallo*, 22 F.3d at 1223.

When cross-motions for summary judgment are made the standard is the same as that for individual motions for summary judgment. *See Morales v. Quintel Entertainment, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). Each motion must be considered independently of the other and, when evaluating

each, the court must consider the facts in the light most favorable to the non-moving party. *See id.*[12]

IV. Recent (Related) Litigation

At the time of the Court's September 5, 2000 Decision, three other district courts had considered constitutional challenges to state alcoholic beverage regulations as they relate to the direct shipment of wine and ruled, *inter alia,* that the challenged statutes were in violation of the dormant Commerce Clause. *See Swedenburg,* 2000 U.S. Dist. LEXIS 12758, 2000 WL 1264285, [WL] at *3-4 (discussing *Bridenbaugh v. O'Bannon,* 78 F. Supp. 2d 828 (N.D. Ind. 1999) (Indiana statute prohibiting direct shipment of wine from out-of-state to an Indiana residence held unconstitutional on motion for summary judgment); *Dickerson v. Bailey,* 87 F. Supp. 2d 691 (S.D. Tex. 2000) (finding upon summary judgment that ban on direct shipment from out-of-state wineries violates the dormant commerce clause); and *Kendall-Jackson Winery, Ltd. v. Branson,* 82 F. Supp. 2d 844 (N.D. Ill. 2000) (preliminary injunction granted where plaintiffs showed likelihood of

[12] Following oral argument, the Court asked the parties to submit additional letters addressing the question of whether an evidentiary hearing was required to resolve the instant motions. On May 16, 2002, Plaintiffs wrote that, "all evidence is before the Court," and that "any evidentiary hearing would be redundant of the extensive evidence presently before the Court." By letter dated May 21, 2002, Defendants argued that "this Court need not hold any evidentiary hearing to decide this case in defendants' favor" but that a hearing would be required on the issue of "whether the State's state temperance objective is pretextual[.]"

success on the merits that the Illinois winery "exemption" violates dormant commerce clause)).[13]

Eight days after the Court issued its September 5, 2002 Decision, the United States Court of Appeals for the Seventh Circuit reversed the Indiana district court's decision in *Bridenbaugh* and found the direct shipping ban to be constitutional. *See Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 854 (7th Cir. 2000) (Easterbrook, J.)[14] In *Bridenbaugh,* plaintiffs had challenged Title 7.1 of the Indiana Code which establishes that state's "three tier" alcohol distribution system. 227 F.3d at 851. Among other things, the Indiana Code "permits local wineries, but not wineries 'in the business of selling . . . in another state or country', to ship directly to Indiana consumers." *Id.* The Seventh Circuit noted that Section 2 of the Twenty-first Amendment "empowers Indiana to control alcohol in ways that it cannot control cheese," *id.,* and also found that Section 2 "enables a state to do to the importation of liquor . . . what it chooses to do to the internal sales of liquor, but nothing more." *Id.* at 853. "Indiana insists that *every* drop of liquor passes through its three-tiered system and be subject to taxation. Wine originating in California, France,

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[13] The exemption at issue in *Kendall-Jackson* provided that Illinois wineries were not bound by the state's "Fair Dealing Act" which regulated "agreements between distributors and suppliers of liquor." 82 F. Supp.2d at 850. As discussed *infra,* a number of states, including New York, exempt in-state wineries from certain basic requirements of the three-tier system.

[14] Judge Easterbrook wrote the *Bridenbaugh* opinion for a two judge panel. *See* 227 F.3d at 848-49 n.* (citing 28 U.S.C. § 46(d)). A third panel member recused himself and did not participate in the consideration or decision of the case. *Id.*

Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?" *Id.*[15]

Following the Seventh Circuit's decision in *Bridenbaugh,* United States District Court Judge Melinda Harmon of the Southern District of Texas granted a motion for reconsideration in *Dickerson,* 87 F. Supp. 2d 691, to allow the parties to address the impact of *Bridenbaugh. Dickerson v. Bailey,* 212 F. Supp. 2d 673, 675 (S.D. Tex. 2002). Upon reconsideration, Judge Harmon adhered to her prior determination that the Texas Alcoholic Beverage Code was unconstitutional, finding that it imposed "differing burdens on in- and out-of-state [wine] producers so as to favor in-state wineries." *Id.* at 694. The Texas three-tier system includes certain legislative exceptions or exemptions that allow in-state, but not out-of-state, wineries to ship directly to Texas consumers. *Id.* at 677. "Because out-of-state producers must go through Texas-licensed wholesalers and retailers to sell wine in Texas, they suffer higher costs which translate into higher prices, which in turn affect their ability to compete with local Texas wineries." *Id.* at 694-95. The Texas ABC law was not "saved" by the Twenty-first Amendment because the state failed "to demonstrate how a statutory exception for local wineries from Texas' three-tier regulatory system

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[15] The court in *Bridenbaugh* rejected the plaintiff's contention that a provision of the Indiana code that allowed (only) holders of wine wholesaler or retailer permits to ship wine directly to Indiana consumers' homes was discriminatory, presumably because permit holders could "deliver California and Indiana wines alike; firms that do not hold permits may not deliver wine from either (or any) source." 227 F.3d at 853.

. . . is justified by any of the traditional core concerns of the twenty-first amendment." *Id.* The court enjoined Texas from enforcing its ban on direct importation (shipment) of wine. *Id.* at 696.

A number of other courts have addressed Commerce Clause challenges to bans on the direct shipping of wine. In *Bainbridge v. Bush,* the District Court for the Middle District of Florida upheld Florida's ban on direct shipment of wine. 148 F. Supp. 2d 1306, 1309 (M.D. Fla. 2001). The court found that the Florida three-tiered system "directly discriminates against out-of-state wineries in violation of the . . . dormant commerce clause . . . by expressly prohibiting out-of-state wineries from shipping their wine directly to non-licensed Florida residents." *Id.* at 1311 (emphasis omitted). "In contrast, in-state wineries have the option of becoming licensed as vendors, thereby avoiding the increased costs of the three-tiered system." *Id.* Florida's statute was nevertheless "saved" because it was a valid exercise of the state's powers under the Twenty-first Amendment. Despite "protectionist overtones", the Florida statute was said to advance the core concerns of temperance and revenue collection. *Id.* at 1313. "Invalidation of the scheme would hinder [Florida's] ability to tax alcoholic beverages sold within the state." *Id.*

On November 8, 2002, the United States Court of Appeals for the Eleventh Circuit vacated the decision in *Bainbridge* and remanded the case to the district court. *Bainbridge v. Turner,* 311 F.3d 1104, 2002 U.S. App. LEXIS 22986, 2002 WL 31487618 (11th Cir. Nov. 8, 2002). The court of appeals agreed with the district court's determination that the Florida direct shipping ban was facially discriminatory, but found that a question of fact remained as to whether the "regulatory scheme is so closely related to

the core concern of raising revenue as to escape Commerce Clause scrutiny." 311 F.3d 1104, 2002 U.S. App. LEXIS 22981, WL at *7 ("Before the State can successfully raise the Twenty-first Amendment as a shield, it must show that its statutory scheme is necessary to effectuate the proffered core concern in a way that justifies treating out-of-state firms differently from in-state firms – a fact question.")[16]

In *Heald v. Engler,* 00 Civ. 71438, Slip. Op. (E.D. Mich. Sept. 28, 2001), the district court found that "direct shipment laws are a permissible exercise of state power under § 2 of the 21st Amendment." Slip Op. at 8. Michigan's three-tiered distribution system contained an "exemption" that allowed in-state wineries, but not out-of-state wineries, to ship directly to consumers. Slip Op. at 3. The court determined that because the Twenty-first Amendment gave states "virtually complete control" over alcohol regulation, a state's action pursuant to the Twenty-first Amendment would only violate the Commerce Clause if it constituted "mere economic protectionism." Slip Op. at 9. Michigan's law was not mere economic protectionism because it was designed to "ensure the collection of taxes" and "reduce the risk of alcohol falling into the hands of minors." Slip Op. at 10.

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[16] In reaching its decision, the Eleventh Circuit found that "interests besides temperance, such as ensuring orderly market conditions and raising revenue are 'unquestionably legitimate' under the Twenty-first Amendment." *Bainbridge,* 2002 U.S. App. LEXIS 22986, 2002 WL 31487618 at *6 (quoting *North Dakota v. United States,* 495 U.S. 423, 432, 109 L. Ed. 2d 420, 110 S. Ct. 1986 (1990)).

Two (other) district courts have found direct shipment laws to be unconstitutional. In *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002), the District Court for the Eastern District of Virginia adopted a Magistrate Judge's report and recommendation that the Virginia direct shipping ban was unconstitutional. 199 F. Supp. 2d at 416. Virginia's three-tiered system "is a misnomer when applied to in-state producer/licensees. It is accurate to state that in-state producer licensees do not have to pass their products through each tier that an out-of-state entity must." *Id.* at 409. **"This is the very definition of a facially discriminatory law."** *Id.* at 407 (emphasis added). The court found that Virginia had not established "that there are no other nondiscriminatory means of enforcing [its] legitimate interests," *id.* at 409, and held that the Twenty-first Amendment did not shield (or save) the direct shipping ban. *Id.* at 411. With respect to remedies, the district court disagreed with the magistrate's recommendation that the exceptions to Virginia's three-tiered system, which (unlawfully) favored in-state wineries, could be severed from the rest of the statute. *Id.* at 415-16; *compare id.* at 450 (Report and Recommendation) ("It is therefore clear that the unconstitutional provisions can be segregated from the Act as a whole and while the Plaintiffs object to the constitutionality of the entire Act's closed system . . . case law . . . does not require the Court to recommend that the entire statutory scheme be declared unconstitutional.") The district court determined that the importation bans were unconstitutional and enjoined their enforcement. *Id.* at 416 ("Declaring unconstitutional and enjoining the enforcement of each of the challenged statutes effects the intent of the legislature, serves the interests of the consumer and dormant Commerce Clause, and preserves the police powers of the

Commonwealth to further its legitimate interests under the ABC regime.").

In *Beskind v. Easley,* 197 F. Supp. 2d 464 (W.D.N.C. 2002), plaintiffs challenged North Carolina's ABC laws, which required most, but not all, of the alcohol sold in North Carolina to pass through a three-tiered system. Plaintiffs objected to an exception in the law which allowed "North Carolina wineries that are licensed to do business in the state [to] bypass the wholesaler and retailer and ship wine directly to North Carolina consumers." *Beskind,* 197 F. Supp. 2d at 467. The court found that the "ABC laws present a relatively cut and dry example of direct discrimination against interstate commerce," and rejected the contention that the Twenty-first Amendment "saved" the regulations. *Id.* at 471 (emphasis omitted). "North Carolina can use the [Twenty-first] Amendment to protect the overall [three-tiered] system, because the system promotes purposes of the Twenty-first Amendment. But it cannot use the Amendment to protect the exception from the Commerce Clause, because the exception does not fulfill a purpose of the Amendment." *Id.* at 474. The court enjoined North Carolina from enforcing the provisions of the law "that prohibit or punish out-of-state wine dealers from directly shipping wines to adult North Carolina residents." *Id.* at 476.

V. Analysis

"No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." NY ABC Law

§ 102(1)(c). Under New York's three-tiered system, permits are issued for "manufacturers, distributors, and retailers."[17] *Bridenbaugh*, 227 F.3d at 851. Out-of-state wineries must, under New York law, participate in New York's three-tier distribution system if they wish to sell wine to New York consumers.

The New York ABC Law also includes (several) significant "exceptions" to the three-tier regulatory scheme which clearly benefit in-state wineries. The exceptions include: (i) a "farm-winery" exception authorizing (licensed) New York farm wineries to ship wine directly to New York consumers;[18] (ii) an exception that allows New York wineries to offer "wine by wire services whereby a winery within the state may make deliveries on behalf of other wineries within the state" (§ 76-5); (iii) an exception for New York commercial wineries to obtain retail sales licenses that allows direct sale (and shipment) to consumers (§ 76-4); and (iv) an exception which permits delivery

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[17] "Virtually all retail sales of wine to consumers in the state must be made by a licensed retailer. . . . " Defendants' Statement of Facts, dated Aug. 17, 2001 at ¶ 46.

[18] " 'Farm winery' is defined as a winery which is **located on a farm in New York State**. Farm winery licensees must manufacture their wine only from New York State grapes, grown of farms operated by persons having . . . at least a 50% financial interest in the license, and cannot use any grapes grown by a person who does not have a financial interest in the license. Farm wineries are limited to the manufacture of no more than 50,000 finished gallons of wine annually." State Liquor Authority Divisional Order No. 714, ¶ 4, dated Aug. 31, 1976 (emphasis added). *But see Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 858 (S.D.N.Y. 1986) (finding that New York statute allowing only "wine product" made exclusively from in-state grapes to be sold in grocery stores was "plain and simple economic protectionism of New York grown grapes . . . and a violation of the commerce clause").

of alcoholic beverages in vehicles owned and operated by the (New York winery) licensee or hired from a trucking company registered with the New York liquor authority (§ 105-9). The obvious purpose and effect of these exceptions is that **"in-state wineries can bypass the middle tier (wholesalers) and the bottom tier (retailers) and sell directly to consumers."** *Beskind,* 197 F. Supp. 2d at 467 (emphasis added).

A. Commerce Clause

"Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 87, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984). "This negative restriction on state power has often been labeled the 'dormant' Commerce Clause." *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272, 1281 (2d Cir. 1995).

The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause. *See Gary D. Peake Excavating Inc. v. Town Bd. of Hancock,* 93 F.3d 68, 73 (2d Cir. 1996). "Under the first step, we determine whether the challenged law 'regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.'" *Id.* at 73-74 (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality Comm'n,* 511 U.S. 93, 93, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994)); *see also C & A Carbone v. Town of Clarkstown,* 511 U.S.

383, 390, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994). A state or local law (directly) discriminates if it provides, as the New York ABC law does, for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *USA Recycling,* 66 F.3d at 1281; *see also Sal Tinnerello & Sons Inc. v. Town of Stonington,* 141 F.3d 46, 55 (2d Cir. 1998). Under the second step, i.e. if a regulation is discriminatory, "the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests." *USA Recycling,* 66 F.3d at 1281-82. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state interests over out-of-state interests, [courts] have generally struck the statute down without further inquiry." *Brown-Forman Distillers v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986) A discriminatory restriction on commerce is "virtually *per se* invalid." *USA Recycling,* 66 F.3d. at 1281 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)).

Defendants contend (unconvincingly) that New York's ABC Law "erects no barrier to the flow of goods and imposes no burden on interstate commerce." Def. Mem. at 14. Defendants argue that the "overwhelming majority of the wine sold in New York – 93.3% – comes from outside the state," in an effort to show "that the system currently

in place does not impede the flow of goods into New York in any way." Def. Mem. at 15.[19]

That the New York direct shipping ban on out-of-state wine burdens interstate commerce and is discriminatory (on its face) is clear from the very wording (let alone the impact) of the exemptions favoring in-state wineries.[20] While out-of-state wineries must consign their products to a (three-tier) wholesaler, in-state wineries do not.[21] Many,

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[19] Defendants take the position that much of the wine sold in New York "comes from outside the state," but also argue that "out-of-state wines do not compete with New York wholesalers or wines." Def. Mem. at 19 (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 136 L. Ed. 2d 761, 117 S. Ct. 811 (1997)). *But see Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984) ("On the stipulated facts of this case, we are unwilling to conclude that no competition exists between the exempted and nonexempted liquors.")

[20] The Court is **not** here ruling that New York's three-tier system (standing alone and apart from its exceptions) is unconstitutional. The Court recognizes that pursuant to the Twenty-first Amendment, the state may adopt reasonable regulations with regard to direct shipments, so long as they are not protectionist. *See, e.g., North Dakota v. United States*, 495 U.S. 423, 431, 109 L. Ed. 2d 420, 110 S. Ct. 1986 (1990).

[21] Defendants also argue that Plaintiffs have "stipulated away any claim that the in-state delivery options constitute a discriminatory local preference," Def. Mem. 21. That is, Defendants point out that the parties have entered into a written agreement (stipulation) that provides: "Plaintiffs challenge in this case only [NY ABC] §§ 102(1)(a),(c), and (d)." Stipulation dated March 28, 2001 (attached as Exhibit 16 to the Declaration of Randy Mastro dated Aug. 17, 2001 ("Mastro Dec."). Plaintiffs do not disavow the stipulation, but rather explain that in their view, the exceptions serve to render the direct shipping ban on out-of-state wine in the N.Y. ABC law unconstitutional. Transcript of Oral Argument, dated April 17, 2001 ("Tr.") at 10 ("The defendants have mischaracterized the fact that we are not challenging the exemptions with abandoning any sort of claim with regard to the exemptions.") *See also* Pl. Mem. at 13 n.16 ("Plaintiffs do not challenge

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if not most in-state wineries fall under one or more of the exceptions to the New York ABC Law.[22] To paraphrase Judge Easterbrook, every drop of (**only**) out-of-state wine must pass through New York's three-tier system. Wine produced in-state may bypass at least two tiers.[23] The New York regime constitutes a "cut and dry example of **direct** discrimination against interstate commerce." *Beskind,* 197 F. Supp. 2d at 471. That the in-state exemptions may apply to a relatively small portion of the total wine purchased in the state is not dispositive. *See Wyoming v. Oklahoma,* 502 U.S. 437, 455, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992) ("The volume of commerce affected measures only the *extent* of discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce.")

The evidence here demonstrates, upon summary judgment, that the exceptions to the ABC Law provide an impermissible economic benefit and (protection) to only in-state interests – but also that there are nondiscriminatory alternatives available. Indeed, the Defendants explicitly

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these exemptions. To the contrary, plaintiff consumers benefit from them, and plaintiff winemakers simply wish to share in the opportunities.")

[22] "Many if not most New York wineries are farm wineries." Affidavit of Plaintiffs' Expert John Dyson dated May 24, 2001, ¶ 12; *see also* Tr. at 17 ("In fact, there are four different exemptions that cover virtually every winery in the state.") (Plaintiffs' counsel at oral argument).

[23] For example, a licensed farm winery, under N.Y. ABC Law § 76-a(6)(d), may direct ship to New York consumers. Similarly, a New York State winery may also become a licensed retailer, and sell wine (and ship directly to consumers) without first consigning it to a wholesaler. *See* N.Y. ABC Law §§ 76(4), 105-9.

concede the exceptions were intended to be protectionist. *See, e.g.*, State Liquor Authority Divisional Order No. 714, ¶ 4, dated Aug. 31, 1976 ("The [farm winery license] bill, adopted in an effort to aid New York State grape growers, creates a 'Farm Winery License,' specifying a low annual license fee of $125.")[24] At oral argument, the Attorney General acknowledged that economic protectionism was the core purpose of the exceptions. "Your Honor, I believe that the legislative history of that provision [the farm winery exemption] indicates that there was an effort to provide an economic benefit to the local farmers." Tr. at 58. *See also Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 271, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984) ("Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry.")

Defendants contend (unconvincingly) that out-of-state wineries "could very easily . . . get a license here to distribute as either a wholesaler or a winery," which would "cost 'probably a few to maybe 10,000 dollars, counting legal fees' to obtain the license in the first place and then only 'a few hundred dollars a year' to maintain it, to have an office or presence." *See* Tr. at 64 (citing Affidavit of John Dyson). It appears unreasonable to this Court to require

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[24] Approximately eighty percent of New York State wineries have farm winery licenses. Of the 110 New York wineries that responded to a National Agricultural Statistics survey, 90 had a farm license and 20 had a commercial license. *See* "Survey of Wineries and Grape Processing Plants," U.S. Department of Agriculture, National Agricultural Statistics Service (released January 24, 2001) *available at* http://www.nass.usda.gov/ny/bulletin/winery/license.htm. ("USDA Survey"), Mastro Dec. Exh. 10.

that an out-of-state winemaker "become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 72, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963). "The Supreme Court views 'with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.'" *Santa Fe Natural Tobacco Co. v. Spitzer,* 2001 U.S. Dist. LEXIS 7548, 00 Civ. 7274, 2001 WL 636441, *16 (S.D.N.Y. June 8, 2001) (quoting *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 100, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)).[25]

Most courts that have addressed a statutory structure similar to New York's – i.e. a three-tier system which includes a general ban on the direct shipment of out-of-state wine but also contains "loopholes" in the form of exceptions for in-state wineries – have found the schemes to be per se violations of the Commerce Clause. *See Bainbridge,* 311 F.3d at 1104, 2002 U.S. App. LEXIS 22986, W.L. at *3 ("Florida's regulatory scheme cannot withstand tier-one [dormant commerce clause] scrutiny."); *Beskind,* 197 F. Supp. 2d at 471 ("The North Carolina ABC law facially discriminates against out-of-state manufacturers. . . ."); *Bolick,* 199 F. Supp. 2d at 409 ("Discrimination occurs as a result of the in-state

[25] Again, this is not to say that the entire New York three-tier system is unconstitutional or that the State does not "enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within [its] borders." *Capital Cities,* 467 U.S. at 714.

preference for entry into the market and direct shipment to consumers. . . ."); *Dickerson,* 212 F. Supp. 2d at 694 ("Texas' ban on direct importation of wine . . . on its face is unconstitutionally and economically discriminatory."); *See also Santa Fe,* 2001 U.S. Dist. LEXIS 7548, [WL] at *14 ("Thus, the statute discriminates on its face against commerce by providing a delivery exemption for New York brick-and-mortar businesses with their own delivery services.") (discussing cigarettes). This Court reaches a similar conclusion. The statutory ban on the direct shipment to New York of out-of-state wine is **not** "evenhanded" and constitutes a *per se* violation of the Commerce Clause. *See Brown-Forman,* 476 U.S. at 579.

B. Twenty-First Amendment

Defendants contend that even if the direct shipping ban on wine were found to be discriminatory, as here, it is "justified 'both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" Def. Mem. at 25 (quoting *Hughes v. Oklahoma,* 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979)). Defendants argue that the direct shipping ban is "a narrowly tailored exercise of the State's police power to control access to alcoholic beverages, to further the interests of public health, welfare and safety, and to promote temperance," and is, therefore, "impervious to Plaintiffs' 'dormant' Commerce Clause challenge under any level of scrutiny." Def. Mem. at 26. Thus, the Defendants argue that New York's three-tiered system is "saved" by the Twenty-first Amendment. *See, e.g., Bainbridge,* 148 F. Supp. 2d at 1310 ("If the statutory scheme violates the commerce clause, it must then be determined whether it is

saved by the Twenty-First Amendment.") Plaintiffs counter that "only those state restrictions which directly promote temperance may now be said to be permissible under section 2 of the 21st Amendment," Pl. Mem. at 7 (citing *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 861 (S.D.N.Y. 1985)), and "that the direct shipment ban cannot be saved by this sole permissible justification." Pl. Mem. at 23. Plaintiffs also argue that the "State has a variety of less-restrictive alternatives available to it." Pl. Reply at 11.

The Court concludes that it is doubtful whether the ABC Laws – and particularly the exceptions – are grounded in the promotion of temperance but that, in any event, viable (socially conscious) alternatives to discrimination against out-of-state wineries are available.[26] The United States Supreme Court has observed that "the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system," and that "the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets." *North Dakota v. United States*, 495 U.S. 423, 431, 109 L. Ed. 2d 420, 110 S. Ct. 1986 (1990) (plurality opinion) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 63 L. Ed. 2d 233,

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[26] While respectfully disagreeing with Defendants' legal position, the Court has paid careful attention to the position of outstanding community leaders such as the Reverend Calvin O. Butts, III (*see* Affidavit, dated Aug. 14, 2001), intervening groups and organizations, and amici such as the City University of New York (*see* Declaration of Frederick P. Schaffer, dated Aug. 14, 2001).

100 S. Ct. 937 (1980)). At the same time, the Twenty-first Amendment does not shield all state regulations from the reach of the Commerce Clause. In fact, the Supreme Court has also said that it would be an "absurd oversimplification" to draw such a conclusion. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32, 12 L. Ed. 2d 350, 84 S. Ct. 1293 (1964). "It is well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause." *Brown-Forman,* 476 U.S. at 584. "Rather the Twenty-first Amendment and the Commerce Clause 'each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.'" *Id.* (quoting *Hostetter,* 377 U.S. at 332).

A question here is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exception[s] for [in-state] wine to outweigh the Commerce Clause principles that would otherwise be offended. Or . . . asked in a slightly different way, 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Bacchus,* 468 U.S. at 275-76 (quoting *Capital Cities,* 467 U.S. at 714). **"State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."** *Bacchus,* 468 U.S. at 276 (emphasis).

Defendants have not shown that New York's ban on the direct shipment of out-of-state wine, and particularly the in-state exceptions to the ban, implicate the State's core concerns under the Twenty-first Amendment. As noted, the

exceptions were enacted to "provide an economic benefit to the local farmers." Tr. at 58. There is evidence in the record that the direct shipping ban was designed to protect New York State businesses from out-of-state competition. *See, e.g.,* Governor's Bill Jacket, 1970 Chapter 242, dated Apr. 24, 1970 at 10 (Memorandum from State Liquor Authority) ("It is manifestly unfair to permit these [out-of-state] unlicensed mail-order concerns to compete with New York State Licensees."); *House of York, Ltd. v. Ring,* 322 F. Supp. 530, 533 (S.D.N.Y. 1970) ("This law was enacted . . . to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages to out-of-state mail order firms selling alcoholic beverages to New York residents.") "One thing is certain: The central purpose of the [Twenty-first Amendment] was not to empower states to benefit local liquor industries by erecting barriers to competition." *Bacchus,* 468 U.S. at 276.

Defendants argue that the core concerns that support the three-tier system generally would be undermined if the (benefits of) the in-state exceptions were extended to out-of-state wineries. *See, e.g.*, Def. Mem. at 11 ("New York's direct shipping ban has helped keep alcohol from reaching minors, but those gains will be lost if common carriers resume direct shipments to New Yorkers of all ages.")[27] Defendants contend that "the direct shipping ban

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[27] Among other evidence, Defendants point to data from the U.S. Department of Health and Human Services in an effort to show that "the incidence of binge drinking is 10.5% higher among all drinkers, and 16.5% higher among minors ages 12 to 17, in 'open' or 'reciprocity' states than in 'three-tier' states." Def. Mem. at 9 (citing Mastro Dec., Ex. 29). Plaintiffs argue that Defendants "fail to establish any nexus

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is the only effective means by which the State can control and limit minors' access to alcoholic beverages." Def. Mem. at 25.[28] **The Court believes that the important goals of temperance and prohibiting the sale of wine to minors can be addressed (in a nondiscriminatory manner) for out-of-state as well as for in-state wineries (which are currently able to sell their products over the internet and to ship directly to homes in New York State).** *See, e.g., Bainbridge,* 311 F.3d at 1104, 2002 U.S. App. LEXIS 22986, WL at *3 ("Florida could license and regulate out-of-state wineries that intend to ship to Florida consumers through a licensing process similar to that employed with in-state wineries."). As Plaintiffs point out, "the exemption for in-state firms undercuts the defense, for the same safeguards can be taken to ensure compliance of out-of-state products with health and safety concerns." Pl. Mem. at 23-24 (citing *Loretto,* 601 F. Supp. at 862).[29]

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between that problem and wine in general, the types of wine at issue in this case, or direct shipping of wine." Pl. Reply at 8.

[28] *See also* Deposition Transcript of Defendants' Expert Henry Wechsler, dated Oct. 2, 2001 at 60 ("You'd have delivery services. You'd expand the number of alcohol outlets to practically every home in the community. This would make it much harder to get cooperation and training and enforcement of the minimum drinking age.") In response, Plaintiffs point out that Professor Wechsler has never "studied wine consumption or direct shipping" and lacks "any actual knowledge of how direct shipping works or what impact it would have on alcohol consumption patterns." Pl. Reply at 8 n.24.

[29] Defendants acknowledge that "third party common carriers" can and currently do verify the age of purchasers to whom they deliver alcoholic beverages. "eVineyards [an online retailer] ensures delivery by an adult 21-years or older by using only state approved common carriers to complete its deliveries. These carriers gather an adult

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Defendants also express concern over the potential for evasion of state liquor taxes if the in-state direct shipping exceptions were extended to out-of-state wineries. Def. Mem. at 25-26. ("The collection of taxes is likewise assured only by requiring that alcoholic beverages be imported into New York by persons who are accountable to the State. . . . ") As a threshold matter, it is not entirely clear that the collection of taxes is, in and of itself, a core concern of the Twenty-first Amendment.[30] Assuming *arguendo* that the core interests under the Twenty-first Amendment include raising revenue, a state may not advance that interest by (any) discriminatory means – i.e. if there are "reasonable nondiscriminatory alternatives." *Oregon Waste,* 511 U.S. at 101. In *Bacchus,* the Supreme Court overturned a Hawaii tax provision that applied a 20 percent excise tax on liquor sold at wholesale, but exempted two locally

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signature at delivery time and submit to eVineyard." Defendants' Statement of Facts, dated Aug. 17, 2001 at ¶ 117.

[30] While Defendants argue that the United States Supreme Court has found that " 'raising revenue' is one of the 'unquestionably legitimate' state interests that fall within a state's 'core' power under the Twenty-first Amendment," Def. Reply at 9 (quoting *North Dakota,* 495 U.S. at 432), Plaintiffs respond that in the Second Circuit, "only those restrictions which directly promote temperance may now be said permissible under Section 2 of the Twenty-first Amendment." *Loretto,* 601 F. Supp. at 861. In *North Dakota,* Justice Stevens, in a plurality opinion, noted that: "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." 495 U.S. at 432. The Court, of course, has no quarrel with that finding – but questions whether each of the interests referenced in *North Dakota* is, standing alone, sufficient to outweigh a discriminatory ban upon the direct shipment of out-of-state wine. Indeed, "no clear consensus concerning the meaning of the provision is apparent." *Bacchus,* 468 U.S. at 274.

produced forms of alcohol.[31] 468 U.S. at 265. The Court found that "the State does not seek to justify its tax on the ground that it was designed to promote temperance or carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote local industry.'" *Id.* at 276. Similarly, New York's discriminatory exemptions, which are designed to promote local industry, are not saved because they may impact the raising of revenue. *See id.* ("Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's . . . claim based on the Amendment."); *see also Bainbridge,* 311 F.3d 1104, 2002 U.S. App. LEXIS 22986, WL at *7 ("We do not think it is sufficient, however, for Florida to simply show that (a) taxation is a 'core concern' and (b) the three-tier distribution scheme, although discriminatory, promotes its revenue raising goals."); *Beskind,* 197 F. Supp. 2d at 474 ("Economic protectionism is not the purpose of this safe harbor from the Commerce Clause.").

The Court does not discern that "the statutes advance 'a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Cooper v. McBeath,* 11 F.3d 547, 553 (5th Cir. 1994) (quoting *New England Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988)). For one thing, New York currently allows direct shipment of in-state wine in a manner that accommodates the State's concerns for minors, temperance and revenue collection.

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[31] The Hawaii statutory scheme, like the New York ABC Law, was originally enacted without exemptions. *Bacchus,* 468 U.S. at 265.

See, e.g., supra n.29; *see also Dickerson,* 87 F. Supp. 2d at 710 ("There is no temperance goal served by the statute since Texas residents can become as drunk on local wines . . . as those that . . . are in practical effect kept out of the state by the statute.") Defendants' contention that "New York simply has no other effective means to control the unfettered access to alcoholic beverages that would ensue if this direct shipping ban were eliminated," (Def. Mem. at 25) is further contradicted by the facts that: (i) historically direct shipment of out-of-state wine for personal consumption was permitted in New York, *see People v. Ryan,* 274 N.Y. 149, 153, 8 N.E.2d 313 (1937) ("no purpose or intent is found to control their personal use"); (ii) as recently as 1995 the State Legislature was amenable to direct shipping and passed a "reciprocity" bill allowing for direct shipment of wine to New York residents from states that allowed direct shipment of New York wine to their residents, *see* Governor's Veto Jacket, 1995 Veto 76, dated Dec. 27, 1995 at 5; and (iii) very recent (November 2002) federal legislation has authorized direct shipment of wine for personal use, *see* Direct Shipment of Wine, H.R. 2215, 107th Cong., Sec. 11022 (2002) (enacted). The State has not established that its legitimate goals cannot be accomplished in a nondiscriminatory manner. *See Bolick,* 199 F. Supp. 2d at 409 ("The question is whether the state can accomplish its legitimate interests without discriminating against out-of-state direct shippers of wine. . . . This they have not done.")

C. Recent Federal Legislation

Defendants argue that the "new federal Direct Shipping Statute stands as Congress' renunciation of federal interest in all direct shipping bans to the extent they are untouched by this new law."[32] Letter from Howard Graff, dated Nov. 4, 2002. Plaintiffs respond that the "provision has no impact on our claims regarding the impermissibility of New York's direct shipping ban under the dormant Commerce Clause." Letter from Clint Bolick, dated Nov. 8, 2002.

"It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine v. Taylor,* 477 U.S. 131, 138, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986); *see also*

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[32] The law, entitled "Direct Shipment of Wine", provides (in part):

> a) CONDITIONS FOR TRANSPORTING CERTAIN WINE. – During any period in which the Federal Aviation Administration has in effect restrictions on airline passengers to ensure safety, the direct shipment of wine shall be permitted from States where wine is purchased from a winery, to another State or the District of Columbia, if –
>
> (1) the wine was purchased while the purchaser was physically present at the winery;
>
> (2) the purchaser of the wine provided the winery verification of legal age to purchase alcohol;
>
> (3) the shipping container in which the wine is shipped is marked to require an adult's signature upon delivery;
>
> (4) the wine is for personal use only and not for resale; and (5) the purchaser could have carried the wine lawfully into the State or the District of Columbia to which the wine is shipped.

H.R. 2215, 107th Cong., Sec. 11022 (2002) (enacted).

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982). "But because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been 'unmistakably clear.'" *Taylor,* 477 U.S. at 138-39 (quoting *Wunnicke,* 467 U.S. at 91).

It is **not** "unmistakably clear" that Congress intended to exempt New York's ABC Law from the limitations of the Commerce Clause. To the contrary, by its terms, the Direct Shipping Statute applies only to the direct shipment of wine purchased in person at an out-of-state winery during a time when the FAA has imposed safety restrictions and the purchaser would have been able to carry the wine into their home state. *See Wunnicke,* 467 U.S. at 92 ("A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.") The new law does not insulate New York's direct shipping ban. *See, e.g., Sporhase v. Nebraska,* 458 U.S. 941, 959-60, 73 L. Ed. 2d 1254, 102 S. Ct. 3456 (1982) ("Although the 37 [Congressional] statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws.")

D. Privileges and Immunities

Plaintiffs contend that the Privileges and Immunities Clause of the United States Constitution "protect[s] the right[s] of the plaintiff winemakers to pursue their chosen

livelihoods free from arbitrary and discriminatory burdens." Pl. Mem. at 9. Specifically, Plaintiffs Juanita Swedenburg and David Lucas, in their individual capacities, *see Swedenburg,* 2000, U.S. Dist. LEXIS 12758 [WL] at *11, argue that the direct shipment ban impairs their right to sell wine. Pl. Mem. at 9. Defendants opposition is two-fold: (i) "because plaintiffs have no viable 'dormant' Commerce Clause claim, they also have no viable Article IV Privileges and Immunities Clause claim," Def. Mem. at 29; and (ii) "the State has 'substantial' and 'perfectly valid independent' reasons for requiring out-of-state wine products to be distributed [in New York] only through licensed in-state wholesalers." *Id.*

In view of the Court's determination that the New York ban on the direct shipment of out-of-state wine violates the Commerce Clause, and the limited briefing on the Privileges and Immunities question, there is no need for the Court further to address this claim. *See, e.g., Barringer v. Griffes,* 1 F.3d 1331, 1332 (2d Cir. 1993).

E. First Amendment

Plaintiffs contend that ABC Law § 102(1)(a) "is a sweeping regulation of speech" and "is blatantly unconstitutional." Pl. Mem. at 28. Defendants counter that the provision is a "narrowly tailored restriction on commercial advertising for alcoholic beverages [that] is plainly aimed at preventing the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed suppliers." Def. Mem. at 29 (emphasis in original). Having concluded that New York's ban on direct shipment of wine into the state is unconstitutional, Section 102(1)(a) may similarly, going

forward, be read to prohibit lawful solicitations on behalf of out-of-state wineries – and needs to be revised.

F. Appropriate Remedy

At the Court's request, following oral argument the parties submitted (additional) briefing on the question of whether (or not) the Court should strike down the protectionist in-state direct shipping exceptions to the New York ABC Laws if it found a violation of the Commerce Clause.[33] Defendants' counsel, including the Attorney General, argue that the Court should "sever and invalidate only those few provisions of New York's ABC Law that permit any in-state direct shipment options and otherwise preserve New York's constitutional 'three tier' system." Defendants' Memorandum on Remedy, dated April 19, 2002.[34] Plaintiffs ask the Court to "establish a truly level playing field" and "strike down the trade barrier and allow out-of-state wineries to ship on the same terms and conditions as in-state wineries." Letter from Clint Bolick, dated April 19, 2002.

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[33] The New York ABC Laws provide that if "any part, provision or section of this chapter or the application thereof to any person or circumstances shall be held invalid by any court of competent jurisdiction, the remainder thereof or the application of such part, provision or section to any other person or circumstances shall not be affected thereby." NY ABC § 161.

[34] Defendants point out that New York retains the "constitutional right to remedy the assumed discrimination by eliminating the in-state advantage." Defendants Memorandum or Remedy, dated April 19, 2002 at 7 (citing *McKesson Corp. v. Div. of Alc. Bev. and Tbb.*, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990)).

"Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Califano v. Westcott,* 443 U.S. 76, 89, 61 L. Ed. 2d 382, 99 S. Ct. 2655 (1979) (quoting *Welsh v. United States,* 398 U.S. 333, 363, 26 L. Ed. 2d 308, 90 S. Ct. 1792 (1970) (Harlan, J. concurring)). "Though the Court has stated that 'extension rather than nullification is the proper course,' the question is ultimately one of legislative intent." *Soto-Lopez v. New York City Civ. Serv. Comm'n,* 755 F.2d 266, 280 (2d Cir. 1985) (citations omitted).

The Court's "task is to discern what course the Legislature would have chosen to follow if it had foreseen our conclusions as to underinclusiveness." *People v. Liberta,* 64 N.Y.2d 152, 170, 474 N.E.2d 567, 578, 485 N.Y.S.2d 207, 218 (1984). "The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether." *People v. Knapp,* 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920) (Cardozo, J.); *see also Gary D. Peake,* 93 F.3d at 72 ("the presence of a severability clause is not dispositive").

The record here – which reflects an earlier version of the New York ABC Law allowing direct shipment into New York for limited personal use and the Legislature's effort in 1995 to allow direct shipment on a reciprocal basis – suggests the route the Legislature might take. And,

severing the ABC Law exceptions might impose economic hardships on New York State wineries which the Legislature may be reluctant to do.[35] *See* Letter from Clint Bolick, dated April 19, 2002; *see also* USDA Survey ("In all but one region [of New York State], sales of wine directly to consumers was the predominant type of sales, generating the largest percentage of total sales dollars.")[36] Elimination of the direct shipping ban rather than elimination of the ABC Law exceptions may be the appropriate remedy. *See Nguyen v. INS,* 533 U.S. 53, 95-96, 150 L. Ed. 2d 115, 121 S. Ct. 2053 ("The choice of extension over nullification also would have the virtue of avoiding injury to parties who are not represented in the instant litigation.") (Scalia, J., concurring); *See also Bolick,* 199 F. Supp. 2d at 416 ("Declaring unconstitutional and enjoining the enforcement of each of the challenged statutes effects the intent of the legislature, serves the interests of the consumer and the dormant Commerce Clause, and preserves the police powers of the Commonwealth to further its legitimate interests under the ABC regime."); *Beskind,* 197 F. Supp. 2d at 476 ("Defendants are enjoined from enforcing state laws . . . that prohibit or punish out-of-state wine dealers from directly shipping wines to adult North Carolina residents."); *Dickerson,* 212 F. Supp. 2d at 696 ("[T]he Court, in the final judgment . . . will enjoin the State of

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[35] It would be helpful to hear from the Attorney General on this issue.

[36] These factors distinguish this case from *Loretto,* in which the Second Circuit found that certain preferences for New York State wine coolers could not stand "for even sixty days [more]." *Loretto,* 761 F.2d at 141.

Texas from enforcing these statutes and defer to action by the legislature to repair the Alcoholic Beverage Code.")

The Court would like to have additional input from the parties before deciding the issue of remedy, and will hold a conference for this purpose on December 5, 2002 at 11 a.m. in Courtroom 706 of the Thurgood Marshall Courthouse, 40 Centre Street, New York, New York. The parties are requested forthwith to "meet and confer" to determine whether consensus can be reached with respect to remedy. Additional briefing, which may become useful, is not called for at this time.

VI. Conclusion

For the aforementioned reasons, Plaintiffs' motion for summary judgment is granted and Defendants' motion for summary judgment is denied.

November 12, 2002

Dated: New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUANITA SWEDENBURG, *et al.*,	x	
Plaintiffs,	:	
-against-	:	00 Civ. 778 (RMB)
EDWARD F. KELLY, *et al.*,	:	**JUDGMENT**
Defendants.	:	
	x	

Recognizing that timely revision of New York's Alcoholic Beverage Control Law is the province of the Legislature, it is hereby,

ORDERED, ADJUDGED AND DECREED, that for the reasons stated in the Court's Decision and Order dated November 12, 2002, plaintiffs' motion for summary judgment is granted, that defendants' motion for summary judgement [sic] is denied, and that:

1. Defendants are enjoined from enforcing N.Y. Alco, and Bev. Cont. Law §§ 102(1)(c) and (d) in manner that would prohibit (i) the winery plaintiffs from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries and (ii) the consumer plaintiffs from receiving wines shipped directly to them from out-of-state wineries on the same terms and conditions applicable to consumers of New York wineries; and

2. Defendants are further enjoined from enforcing N.Y. Alco. and Bev. Cont. Law § 102(a) against the winery plaintiffs in a manner that would prevent them from conveying lawful information to New York consumers on the same

terms and conditions applicable to New York wineries; and

3. Enforcement of this judgment (and its injunctions) are stayed pending any appeal to the United States Court of Appeals for the Second Circuit or, if no appeal is taken, until expiration of the time for taking such appeal.

Dated: New York, New York
December 10, 2002

/s/ RMB
RICHARD M. BERMAN,
U.S.D.J.

U.S. Const., art. I, § 8, cl. 3 (Commerce Clause)

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const. art. IV, § 2
(Privileges and Immunities Clause)

Clause 1: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. amend. XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

TITLE 27. INTOXICATING LIQUORS

CHAPTER 6. TRANSPORTATION IN INTERSTATE COMMERCE

27 USCS § 121 (2003)

§ 121. State statutes as operative on termination of transportation; original packages

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

TITLE 27. INTOXICATING LIQUORS

CHAPTER 6. TRANSPORTATION IN INTERSTATE COMMERCE

27 USCS § 122 (2003)

§ 122. Shipments into States for possession or sale in violation of State law

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the

United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to bug subject to the jurisdiction thereof, which said spirituous, vinus, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

TITLE 27. INTOXICATING LIQUORS

CHAPTER 6. TRANSPORTATION IN INTERSTATE COMMERCE

27 USCS § 122a (2003)

§ 122a. Injunctive relief in Federal district court

(a) Definitions. In this section –

(1) the term "attorney general" means the attorney general or other chief law enforcement officer of a State or the designee thereof;

(2) the term "intoxicating liquor" means any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind;

(3) the term "person" means any individual and any partnership, corporation, company, firm, society, association, joint stock company, trust, or other entity capable of holding a legal or beneficial interest in property, but does not include a State or agency thereof; and

(4) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(b) Action by State attorney general. If the attorney general has reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief (including a preliminary or permanent injunction) against the person, as the attorney general determines to be necessary to –

(1) restrain the person from engaging, or continuing to engage, in the violation; and

(2) enforce compliance with the State law.

(c) Federal jurisdiction.

(1) In general. The district courts of the United States shall have jurisdiction over any action brought under this section by an attorney general against any person, except one licensed or otherwise authorized to produce, sell, or store intoxicating liquor in such State.

(2) Venue. An action under this section may be brought only in accordance with section 1391 of title 28, United States Code, or in the district in which the recipient of the intoxicating liquor resides or is found.

(3) Form of relief. An action under this section is limited to actions seeking injunctive relief (a preliminary and/or permanent injunction).

(4) No right to jury trial. An action under this section shall be tried before the court.

(d) Requirements for injunctions and orders.

(1) In general. In any action brought under this section, upon a proper showing by the attorney general of the State, the court may issue a preliminary or permanent injunction to restrain a violation of this section. A proper showing under this paragraph shall require that a State prove by a preponderance of the evidence that a violation of State law as described in subsection (b) has taken place or is taking place.

(2) Additional showing for preliminary injunction. No preliminary injunction may be granted except upon –

(A) evidence demonstrating the probability of irreparable injury if injunctive relief is not granted; and

(B) evidence supporting the probability of success on the merits.

(3) Notice. No preliminary or permanent injunction may be issued under paragraph (1) without notice to the adverse party and an opportunity for a hearing.

(4) Form and scope of order. Any preliminary or permanent injunction entered in an action brought under this section shall–

(A) set forth the reasons for the issuance of the order;

(B) be specific in terms;

(C) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and

(D) be binding upon.

(i) the parties to the action and the officers, agents, employees, and attorneys of those parties; and

(ii) persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise.

(5) Admissibility of evidence. In a hearing on an application for a permanent injunction, any evidence previously received on an application for a preliminary injunction in connection with the same civil action and that would otherwise be admissible, may be made a part of the record of the hearing on the permanent injunction.

(e) Rules of construction. This section shall be construed only to extend the jurisdiction of Federal courts in connection with State law that is a valid exercise of power vested in the States–

(1) under the twenty-first article of amendment to the Constitution of the United States as such article of amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States; and

(2) under the first section herein as such section is interpreted by the Supreme Court of the United States; but shall not be construed to grant to States any additional power.

(f) Additional remedies.

(1) In general. A remedy under this section is in addition to any other remedies provided by law.

(2) State court proceedings. Nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 8. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 102 (2003)

§ 102. General prohibitions and restrictions

1. (a) No person shall send or cause to be sent into the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind containing an advertisement or a solicitation of any order for any alcoholic beverages, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, unless such person shall be duly licensed hereunder to traffic in alcoholic beverages.

(b) No person shall issue or publish or cause to be issued or published in the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind

containing an advertisement or a solicitation of any order for any alcoholic beverages, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, unless such person shall be duly licensed hereunder to traffic in alcoholic beverages.

(c) No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages. This prohibition shall apply to all shipments of alcoholic beverages into New York state and includes importation or distribution for commercial purposes, for personal use, or otherwise, and irrespective of whether such alcoholic beverages were purchased within or without the state, provided, however, this prohibition shall not apply to any shipment consigned to a New York resident who has personally purchased alcoholic beverages for his personal use while outside the United States for a minimum period of forty-eight consecutive hours and which he has shipped as consignor to himself as consignee. Purchases made outside the United States by persons other than the purchaser himself, regardless whether made as his agent, or by his authorization or on his behalf, are deemed not to have been personally purchased within the meaning of this paragraph.

(d) No common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages, provided, however, that alcoholic beverages may be delivered by a trucking permittee from a steamship or railroad station or terminal to a New York resident who has personally purchased alcoholic beverages for his personal use while outside the

United States for a minimum period of forty-eight consecutive hours, and which he has shipped as consignor to himself as consignee, and except as so stated, no trucking permittee shall accept for delivery, deliver or transport from a steamship or railroad station or terminal any shipment of alcoholic beverages consigned to a non-licensed person having his home or business in New York state. Purchases of alcoholic beverages made outside the United States by persons other than the purchaser himself, regardless whether made as his agent, or by his authorization or on his behalf, are deemed not to have been personally purchased within the meaning of this paragraph.

(e) Subdivisions (c) and (d) hereof shall apply to alcoholic beverages, either in the original package or otherwise, whether intended for commercial or personal use, as well as otherwise, and to foreign, interstate, as well as intrastate, shipments or carriage, irrespective of whether such alcoholic beverages were purchased within or without the state.

(f) Nothing in this chapter shall be deemed to exempt from taxation the sale or use of any alcoholic beverages subject to any tax imposed under or pursuant to the authority of the tax law or to grant any other exemption from the provisions of such law.

2. No person holding any license hereunder, other than a license to sell an alcoholic beverage at retail for off premises consumption, shall knowingly employ in connection with his business in any capacity whatsoever, any person, who has been convicted of a felony, or any of the following offenses, who has not subsequent to such conviction received an executive pardon therefor removing any civil

disabilities incurred thereby, a certificate of good conduct or other relief from disabilities provided by law, or the written approval of the state liquor authority permitting such employment, to wit:

(a) Illegally using, carrying or possessing a pistol or other dangerous weapon;

(b) Making or possessing burglar's instruments;

(c) Buying or receiving or criminally possessing stolen property;

(d) Unlawful entry of a building;

(e) Aiding escape from prison;

(f) Unlawfully possessing or distributing habit forming narcotic drugs;

(g) Violating subdivisions six, eight, ten or eleven of section seven hundred twenty-two of the former penal law as in force and effect immediately prior to September first, nineteen hundred sixty-seven, or violating sections 165.25, 165.30 or subdivision three of section 240.35 of the penal law;

(h) Vagrancy or prostitution; or

(i) Ownership, operation, possession, custody or control of a still subsequent to July first, nineteen hundred fifty-four.

If, as hereinabove provided, the state liquor authority issues its written approval for the employment by a licensee, in a specified capacity, of a person previously convicted of a felony or any of the offenses above enumerated, such person, may, unless he is subsequently

convicted of a felony or any of such offenses, thereafter be employed in the same capacity by any other licensee without the further written approval of the authority unless the prior approval given by the authority is terminated.

The liquor authority may make such rules as it deems necessary to carry out the purpose and intent of this subdivision.

3. [Renumbered].

3-a. No licensee or permittee shall purchase or agree to purchase any alcoholic beverages from any person within the state who is not duly licensed to sell such alcoholic beverage as the case may be, at the time of such agreement and sale nor give any order for any alcoholic beverage to any individual who is not the holder of a solicitor's permit, except as provided for in section eighty-five or ninety-nine-g of this chapter.

3-b. No retail licensee shall purchase, agree to purchase or receive any alcoholic beverage except from a person duly licensed within the state by the liquor authority to sell such alcoholic beverage at the time of such agreement and sale to such retail licensee, except as provided for in section eighty-five or ninety-nine-g of this chapter.

4. No licensee or any of his or its agents, servants or employees shall peddle any liquor and/or wine from house to house by means of a truck or otherwise, where the sale is consummated and delivery made concurrently at the residence or place of business of a consumer. This subdivision shall not prohibit the delivery by a licensee to consumers, pursuant to sales made at the place of business of said licensee.

5. No licensee shall employ any canvasser or solicitor for the purpose of receiving an order from a consumer for any liquor and/or wine at the residence or place of business of such consumer, nor shall any licensee receive or accept any order, for the sale of any liquor and/or wine, which shall be solicited at the residence or place of business of a consumer. This subdivision shall not prohibit the solicitation by a wholesaler of an order from any licensee at the licensed premises of such licensee.

6. No alcoholic beverage shall be released for delivery from any warehouse located within the state, except upon a permit having first been obtained as provided by this chapter. Applications for such permits may be filed at the office of the liquor authority in New York, Albany or Buffalo, whichever is nearest to the location of the warehouse, and shall be upon a form to be prepared by the liquor authority. This provision shall not apply to alcoholic beverages, which are to be released for shipment outside of the state.

7. Each person owning or operating any warehouse located within the state shall keep and maintain as part of his permanent records, treasury department forms fifty-two and fifty-two-a as heretofore required by the United States government.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 1. SHORT TITLE; POLICY OF STATE AND PURPOSE OF CHAPTER; DEFINITIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 3 (2003)

§ 3. Definitions

Whenever used in this chapter, unless the context requires otherwise:

12-a. "Farm winery" means and includes any place or premises, located on a farm in New York state, in which wine is manufactured and sold.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 6. SPECIAL PROVISIONS RELATING TO WINE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS AI Bev § 76 (2003)

§ 76. Winery license

1. Any person may apply to the liquor authority for a winery license as provided for in this article. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a [fig 1] check or draft [fig 2] for the amount required by this article for such license. If the liquor authority shall grant the application

it shall issue a license in such form as shall be determined by its rules.

2. (a) Any person having applied for and received a license as a winery or farm winery under this section or section seventy-six-a of this [fig 1] article may conduct wine tastings of New York state labelled [sic] wines in establishments licensed under section sixty-three of this chapter to sell alcoholic beverages for off premises consumption. Such winery or farm winery may charge a fee [fig 2] for each wine sample tasted. The state liquor authority shall promulgate rules and regulations regarding such tastings as provided for in this subdivision.

(a-1) (Added, L 1997) Any person having applied for and received a license as a winery or farm winery under this section or section seventy-six-a of this article may conduct wine tastings of New York state labelled [sic] wines and apply to the liquor authority for a permit to sell wine produced by such winery or farm winery, by the bottle, during such tastings in establishments licensed under section sixty-four of this chapter to sell alcoholic beverages for consumption on the premises. Such winery or farm winery may charge a fee of no more than twenty-five cents for each wine sample tasted. The state liquor authority shall promulgate rules and regulations regarding such tastings as provided for in this subdivision.

(b) Tastings shall be conducted subject to the following limitations:

(i) wine tastings shall be conducted by an official agent, representative or solicitor of one or more wineries or farm wineries. Such agent, representative or solicitor shall be physically present at all times during the conduct of the tastings; and

(ii) any liability stemming from a right of action resulting from a wine tasting as authorized herein and in accordance with the provisions of sections 11-100 and 11-101 of the general obligations law, shall accrue to the farm winery or winery licensee.

3. A licensed winery may apply to the liquor authority for a license to sell wine at retail for consumption on the premises [fig 1]. All the provisions of this chapter relative to licenses to sell wine at retail for consumption on the premises shall apply so far as applicable to such application.

3-a. (Added, L 2003) Notwithstanding any other provision of law, any winery, licensed pursuant to subdivision three of this section to sell wine at retail for consumption on the premises in a restaurant in or adjacent to the winery, may apply to the liquor authority for a license to sell beer, wine or liquor at retail for consumption on the premises of such restaurant. All of the provisions of this chapter relative to licenses to sell beer, wine or liquor at retail for consumption on the premises shall apply so far as applicable to such application.

4. [Expires and repealed Oct 15, 2008] Notwithstanding any provision of this chapter to the contrary, any one or more winery licensees or farm winery licensees, singly or jointly, may apply to the liquor authority for a license or licenses to sell wine at retail for consumption off the premises. The duration of such license shall be coextensive with the duration of such licensee's winery license or farm winery license, and the fee therefor shall be five hundred dollars if such retail premises is located in cities having a population of one million or more; in cities having less than one million population and more than one hundred thousand, two hundred fifty dollars; and elsewhere, the

sum of one hundred twenty-five dollars. Such license shall entitle the holder thereof to sell at retail for consumption off the premises any New York state labelled [sic] wine. Such license shall also entitle the holder thereof to conduct [fig 1] wine tastings and engage in any of the activities authorized by paragraphs (a), (b) and (c) of subdivision four of section seventy-seven of this article on such licensed premises. Such license shall also authorize the sale by the holder thereof of New York state labelled [sic] wine, in sealed containers for off-premises consumption, from the specially licensed premises of any person licensed pursuant to section eighty-one-a of this article to sell wine at retail for consumption on premises in which the principal business is the operation of a legitimate theater or such other lawful adult entertainment or recreational facility as the liquor authority may classify for eligibility pursuant to subdivision six of section sixty-four-a of this chapter. Not more than five such licenses shall be issued to any licensed winery or farm winery. All other provisions of this chapter relative to licenses to sell wine at retail for consumption off the premises at the winery shall apply so far as applicable to such application. The liquor authority is hereby authorized to adopt such rules as it may deem necessary to carry out the purpose of this subdivision, provided that all licenses issued pursuant to this subdivision shall be subject to the same rules and regulations as are applicable to the sale of wine at retail for consumption off the premises of the winery licensee or farm winery licensee.

5.*

* There are two subdivisions 5.

Notwithstanding any provision of this chapter to the contrary, a licensed winery or a licensed farm winery may

apply to the liquor authority for a permit to sell New York state labelled [sic] wine, by the bottle, at the state fair, at recognized county fairs and at farmers markets operated on a not-for-profit basis. As a condition of the permit, [fig 1] an agent, representative, or solicitor from the winery must be present at the time of sale.

5. *

* There are two subdivisions 5.

Any winery licensed pursuant to this section is authorized to engage in what is commonly known as wine by wire services whereby a winery within the state may make deliveries on behalf of other wineries within the state.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 6. SPECIAL PROVISIONS
RELATING TO WINE

**GO TO CODE ARCHIVE DIRECTORY
FOR THIS JURISDICTION**

NY CLS Al Bev § 76-a (2003)

§ 76-a. Farm winery license

1. Any person may apply to the liquor authority for a farm winery license as provided for in this article. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a [fig 1] check or draft [fig 2] for the amount required by this article for such license. If the liquor authority shall grant the application it shall issue a license in such form as shall be determined by its rules.

2. [Repealed]

3. A farm winery license shall authorize the holder thereof to operate a farm winery for the manufacture of wine at the premises specifically designated in the license. Such a license shall also authorize the sale in bulk by such licensee from the licensed premises of the products manufactured under such license to any winery licensee, any other farm winery licensee, any distiller licensee or to a permittee engaged in the manufacture of products which are unfit for beverage use and to sell or deliver such wine to persons outside the state pursuant to the laws of the place of such sale or delivery. It shall also authorize the holder thereof to sell from the licensed premises to a licensed wholesaler or retailer, or to a corporation operating railroad cars or aircraft for consumption on such carriers, or at retail for consumption off the premises, wine manufactured by the licensee as above set forth and to sell or deliver such wine to persons outside the state pursuant to the laws of the place of such sale or delivery. All wine sold by such licensee for consumption off the premises shall be securely sealed and have attached thereto a label setting forth such information as shall be required by this chapter. Such license shall also be deemed to include authorization to sell cider and wine at retail for consumption on or off the premises; and to sell wine at retail for consumption on the premises of a restaurant, conference center, inn, bed and breakfast or hotel business owned and operated by the licensee in or adjacent to the farm winery for which the licensee is licensed. A licensee who operates a restaurant, conference center, inn, bed and breakfast or hotel pursuant to such authority shall comply with all applicable provisions of this chapter which relate

to licenses to sell wine at retail for consumption on the premises.

4. (a) A far. winery license shall authorize the holder thereof to manufacture, bottle and sell fruit juice, fruit jellies and fruit preserves, tonics and unpotable wine cooking sauces on and from the licensed premises.

(b) Such license shall authorize the holder thereof to store and sell gift items in a tax-paid room upon the licensed premises. These gift items shall be limited to the following categories:

(1) Wine supplies, which shall include any item utilized for the storage, serving or consumption of wine. These supplies may be sold as single items or may be combined into a package sold as a unit item or may be combined into a package containing wine or a wine product;

(2) Food items, which shall include any food or food product not specifically prepared for immediate consumption upon the premises. Such food items may be combined into a package containing wine or a wine product;

(3) Souvenirs, which shall include any item which can be construed to represent or serve as a memento of the licensed premises or of the state of New York.

(4) (Added, L 1993) New York state labelled [sic] wine produced or manufactured by any other New York state winery or farm winery licensee. Such wine may be purchased outright by the licensee from a New York winery or farm winery licensee or obtained on a consignment basis pursuant to a written agreement between the selling and purchasing licensee.

(c) The authority is hereby authorized to promulgate rules and regulations to effectuate the purposes of this subdivision.

(d) A licensed farm winery may engage in any other business on the licensed premises subject to such rules and regulations as the liquor authority may prescribe. In prescribing such rules and regulations, the liquor authority shall promote the expansion and profitability of wine production and of tourism in New York, thereby promoting the conservation, production and enhancement of New York state agricultural lands. Further, such rules and regulations [fig 1] shall determine which businesses will be compatible with the policy and purposes of this chapter and shall consider the effect of particular businesses on the community and area in the vicinity of the farm winery licensee.

5. No licensed farm winery shall manufacture or sell any wine not produced exclusively from grapes or other fruits or agricultural products grown or produced in New York state.

6. (Added, L 1993) Notwithstanding any other provision of this chapter, a farm winery license shall authorize the holder thereof to:

(a) Offer for sale or solicit any order in the state for the sale of any New York state labelled [sic] wine manufactured by the licensee or any other winery or farm winery licensed pursuant to this article.

(b) Engage as a broker in the purchase and sale of New York state labelled [sic] wines for a fee or commission for or on behalf of any winery or farm winery licensed pursuant to this article.

(c) Maintain a warehouse on the premises pursuant to section ninety-six of this chapter for the warehousing of any New York state labelled [sic] wines manufactured by any winery or farm winery licensed pursuant to this article. Any winery or farm winery that maintains such a warehouse must comply with the provisions of section ninety-six of this chapter.

(d) Deliver or transport any New York state labelled [sic] wine manufactured or produced by the licensee or any other winery or farm winery licensed pursuant to this article in any vehicle owned, leased or hired by the licensee. The New York state labelled [sic] wine can be delivered, transported or sold by the licensee to any holder of: (i) a winery or farm winery license, (ii) a license to sell alcoholic beverages for consumption on the premises, (iii) a license to sell alcoholic beverages for consumption off the premises, (iv) or any person that can receive or purchase wine from a farm winery. The licensee is not required to obtain from the liquor authority a trucking permit or pay any fees pursuant to section ninety-four of this chapter.

7. No licensed farm winery shall manufacture in excess of one hundred fifty thousand finished gallons of wine annually.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 7. SPECIAL PERMITS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 99-b (2003)

§ 99-b. Miscellaneous permits

1. The liquor authority is hereby authorized to issue a permit to:

a. A sheriff, marshal, assignee for the benefit of creditors, trustee or receiver in bankruptcy, executor or administrator of an estate, to sell the stock of alcoholic beverages which came into his possession pursuant to judicial process.

b. A steamship company or company operating aircraft, or its duly authorized agent, to purchase from a manufacturer or wholesaler in this state alcoholic beverages for ship's stores for consumption outside the territorial jurisdiction of the state, and not for purposes of resale in this state.

c. A person engaged in the manufacture of products which are unfit for beverage use and classified by the United States treasury department, as exempt from special and commodity taxes to purchase liquor, wine or beer from licensed wholesalers and manufacturers for use only in the process of manufacture of such products.

d. A fire insurance company or fire salvage company, under the supervision of the New York state department of insurance, to sell to licensees alcoholic beverages which came into its possession as a result of a fire on licensed premises.

e. A hospital, which shall mean a place for overnight care of the sick, conducted or licensed by the state or a political subdivision thereof or subject to visitation and inspection by the state board of social welfare to purchase liquor, wine or beer for medicinal use only in the treatment of bona fide patients of such hospital.

f. A licensee who is liquidating or selling his business, or a former licensee whose license was surrendered or expired, to sell his entire stock of alcoholic beverages to other licensees.

g. A warehouseman, railroad company, steamship company, or other person who has acquired a lien pursuant to law for the storage or carriage of alcoholic beverages, to sell such alcoholic beverages to a licensee.

h. [Repealed]

i. A bank or trust company incorporated under articles three, seven or twelve of the banking law or a foreign banking corporation licensed by superintendent of insurance of this state or a banking corporation organized under the laws of the United States and doing business in this state, to sell warehouse receipts pertaining to alcoholic beverages which it has accepted as collateral security for a loan to a licensee and which it acquired through default in the payment of such loan.

j. A person duly licensed outside the state of New York to manufacture or sell alcoholic beverages at wholesale, or his duly authorized representative, to negotiate and consummate contracts or agreements with licensed wholesalers in this state for the establishment of operating agency relationships for the sale of its products in this state.

k. A person to purchase, receive or sell alcoholic beverages or receipts, certificates, contracts or other documents pertaining to alcoholic beverages, in cases not expressly provided for by this chapter, when in the judgment of the liquor authority it would be appropriate and consistent with the purpose of this chapter.

l. (1) Licensed wineries and licensed farm wineries to sell New York state labelled [sic] wine, by the bottle, at the state fair, at recognized county fairs and at farmers markets operated on a not-for-profit basis.

(2) The permit shall be valid for the length of the event, but not for a period to exceed one year.

(3) No fee shall be charged for permits issued pursuant to this subdivision.

2. Each such permit and the exercise of the privilege granted thereby may be subjected to such rules and conditions by the liquor authority as it deems necessary.

3. Each such permit shall be issued in such form as shall be prescribed by the liquor authority and shall be valid for one transaction only, except that a permit issued pursuant to [fig 1] paragraph b, c, e, or j of subdivision one of this section may be issued either for one transaction or for a calendar year. The liquor authority may, by rule, fix the quantity of alcoholic beverages to be involved in a single transaction under a permit issued pursuant to [fig 2] paragraph k of subdivision one of this section, but no single transaction so authorized shall involve more than twenty cases of alcoholic beverages. The fee for each such permit shall be fixed by the liquor authority, but shall not exceed [fig 3] ninety dollars for a permit valid for one

transaction only nor two hundred fifty-six dollars for a permit issued for a calendar year.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 8. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev §105 (2003)

§ 105. Provisions governing licensees to sell at retail for consumption off the premises

9. No retail licensee for off-premises consumption shall deliver any liquors or wines except in vehicles owned and operated by such licensee, or hired and operated by such licensee from a trucking or transportation company registered with the liquor authority, and shall only make such deliveries at the premises of the purchaser.

NEW YORK CONSOLIDATED LAW SERVICE

ALCOHOLIC BEVERAGE CONTROL LAW
ARTICLE 8. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Al Bev § 130 (2003)

§ 130. Penalties for violation of chapter

1. Any person who manufactures for sale or sells alcoholic beverages, other than the illicit alcoholic beverages as defined in section one hundred fifty, without

having an appropriate license therefor, or whose license has been revoked, surrendered or cancelled, shall be guilty of a misdemeanor, and upon first conviction thereof shall be punished by a fine not more than two times the cost of a special on premises license in the county where the unlawful act took place or by imprisonment in a county jail or penitentiary for a term of not less than thirty days nor more than one year or both and upon second conviction thereof shall be punished by a fine not less than two times and not more than three times the cost of a special on premises license in the county where the unlawful act took place or by imprisonment in a county jail or penitentiary for a term of not less than thirty days nor more than one year or both and upon all subsequent convictions thereof shall be punished by a fine not less than three times and not more than four times the cost of a special on premises license in the county where the unlawful act took place or by imprisonment in a county jail or penitentiary for a term of not less than thirty days nor more than one year or both provided, however, that in default of payment of any fine imposed, such person shall be imprisoned in a county jail or penitentiary for a term of not less than thirty days.

1-a. Any licensee, whose license has been suspended pursuant to the provisions of this chapter, who sells alcoholic beverages during the suspension period, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two hundred dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months, or by both such fine and imprisonment.

2. Any person who shall make any false statement in the application for a license or a permit under this chapter shall be guilty of a misdemeanor, and upon conviction

thereof shall be punishable by a fine of not more than two hundred dollars, or by imprisonment in a county jail or penitentiary for a term of not more than six months or both.

3. Any violation by any person of any provision of this chapter for which no punishment or penalty is otherwise provided shall be a misdemeanor, provided, however, that the provisions of this subdivision shall not apply to the prohibitions provided for in subdivision six-a of section one hundred six of this chapter.

4. In the city of New York, a summons shall be issued for a violation of the provisions of subdivision fourteen of section one hundred and five, section one hundred and five-a and subdivision five of section one hundred and six of this chapter in the same manner as provided by subdivision h of section one hundred and sixteen of the New York city [sic] criminal courts act.

5. Any violation by any person of the alcoholic beverage control law for which no punishment or penalty is otherwise provided shall be a misdemeanor, provided, however, that the provisions of this subdivision shall not apply to the prohibitions provided for in subdivision six-a of section one hundred six of this chapter.

NEW YORK CONSOLIDATED LAW SERVICE

PENAL LAW
PART ONE. GENERAL PROVISIONS
TITLE A. GENERAL PURPOSES,
RULES OF CONSTRUCTION, AND DEFINITIONS
ARTICLE 10. DEFINITIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Penal § 10.00 (2004)

§ 10.00. Definitions of terms of general use in this chapter

Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

4. "Misdemeanor" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

No. 03-1274

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

JUANITA SWEDENBURG, IN HER OWN CAPACITY, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, CHAIRMAN OF THE STATE LIQUOR AUTHORITY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE OF NEW YORK, IN HIS OFFICIAL CAPACITIES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE OF NEW YORK RESPONDENTS

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QUESTIONS PRESENTED

1. Whether New York's ban on direct shipment of alcoholic beverages by unlicensed out-of-state wineries falls within the powers conferred upon the States by the Twenty-First Amendment.

2. If not, whether New York's direct shipment ban violates the dormant Commerce Clause.

3. Whether New York's direct shipment ban violates the Privileges and Immunities Clause of Article IV.

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs-appellees below, are Juanita Swedenburg, in her own capacity and as proprietor of Swedenburg Winery, a Virginia partnership; David Lucas, in his own capacity and as proprietor of The Lucas Winery, a California sole proprietorship; and Patrick Fitzgerald, Cortes DeRussy, and Robin Brooks, who are New York residents.

State respondents, who were defendants-appellants below, are Edward F. Kelly, Chairman of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacity; and Lawrence J. Gedda and Joseph Zarriello, Commissioners of the New York State Liquor Authority, in their official capacities.

Private respondents, who were intervenor-defendants-appellants below, are Charmer Industries, Inc., Peerless Importers, Inc., Premier Beverage Company LLC, and Eber Brothers Wine and Liquor Corp., each a New York-licensed alcoholic beverage wholesaler; Local 2D of the Allied Food and Commercial Workers International Union, a union comprised of commissioned alcoholic beverages salespeople in the New York metropolitan area; and Metropolitan Package Store Association, Inc., a trade association of New York-licensed alcoholic beverage retailers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 358 F.3d 223 (2d Cir. 2004). The opinion of the district court granting summary judgment to petitioners (Pet. App. 34a-71a) is reported at 232 F. Supp. 2d 135 (S.D.N.Y. 2002). The order of the district court entering judgment for the petitioners (Pet. App. 72a-73a) is not reported.

STATEMENT OF JURISDICTION

The judgment below was entered on February 12, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Like many other states, New York has long had a three-tiered system for the distribution of alcoholic beverages. N.Y. Alco. Bev. Cont. Law §§ 1 *et seq.* ("ABC Law"). Under this system, manufacturers of alcoholic beverages sell their products to licensed New York wholesalers, who in turn sell them to licensed retailers; the retailers then distribute them to consumers. ABC Law § 100(1), (2). Like alcoholic beverages manufactured in New York, alcoholic beverages imported from other states are also subject to this regulatory regime. Thus, section 102(1)(c) of the ABC Law provides that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." *See also* ABC Law § 102(1)(d) (applying same restriction to common carriers).

Licensed wineries, however, can opt out of this three-tiered system. A licensed winery may sell and ship its wine to another licensed winery, a wholesaler, or a retailer. *Id.* § 77(1). It also may obtain a retail license allowing it to sell and ship its wines directly to consumers. *Id.* §§ 76(4), 77(2). This option is available not only to New York wineries, but also to wineries that manufacture their wine in other states, as long as they "maintain[] a branch factory, office or storeroom within the state of New York and receive[] wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state." *Id.* § 3(37).

These provisions of the ABC Law, which ban direct shipment by unlicensed out-of-state wineries, but make a license to ship available to any winery with a physical presence in New York, are at the center of the current litigation. In February 2000, the proprietors of two out-of-state wineries (petitioners Juanita Swedenburg and David Lucas), together with three New York wine consumers (petitioners Patrick Fitzgerald, Cortes DeRussy, and Robin Brooks), filed suit against three officials of the New York State Liquor Authority ("SLA")in the United States District Court for the Southern District of New York. Petitioners argued that sections 102(1)(c) and (d) of the ABC Law, which prohibit the direct importation of alcoholic beverages to New York consumers, unfairly discriminate against out-of-state wineries. They sought a declaration that these provisions were unconstitutional under the dormant Commerce Clause and Article IV's Privileges and Immunities Clause. They also sought an injunction barring enforcement of the challenged provisions.[1]

---

1. Petitioners also challenged section 102(1)(a) of the ABC Law, which limits the solicitation of orders for alcoholic beverages, and both the district court and the Second Circuit invalidated that provision. Pet. App. 30a-33a; 67a-68a. This issue is not before the Court.

After the parties cross-filed for summary judgment, the district court granted summary judgment in favor of petitioners. Pet. App. 34a-71a. It held that a regulation limiting the importation of alcohol in a manner that discriminated against interstate commerce would survive a dormant Commerce Clause challenge only if it promoted one of the "core concerns" underlying the Twenty-First Amendment. *Id.* at 59a. The court found that the goals of temperance and preventing sale of wine to minors could adequately be served by alternatives less restrictive than New York's regulatory scheme, and that the challenged provisions therefore were not saved by Section 2 of the Twenty-First Amendment. *Id.* at 61a. The court entered judgment in petitioners' favor, enjoining the State from enforcing sections 102(1)(c) and (d) in a manner that would prohibit the winery petitioners "from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries," but stayed its judgment pending appeal. Pet. App. 72a-73a.

Both the State and private intervenors timely appealed, and the Second Circuit unanimously reversed the judgment of the district court. *Id.* at 1a-33a.

The court first acknowledged that five other circuits had recently considered the constitutionality of similar direct shipment bans. *Id.* at 11a. These courts of appeals, the Second Circuit noted, had developed conflicting frameworks in analyzing the interplay between the Twenty-First Amendment and the dormant Commerce Clause. *Id.* at 12a-13a.

As the Second Circuit recognized, the Fourth, Fifth, Sixth and Eleventh Circuits considered whether the challenged statute discriminates against or impermissibly burdens

interstate commerce, and if so, whether the statute was "saved" by advancing the Twenty-First Amendment. *Id.* at 12a (citing *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1108 (11th Cir. 2002). In contrast, the Seventh Circuit "consider[ed] the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause." Pet. App. 13a (citing *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub nom. Bridenbaugh v. Carter*, 532 U.S. 1002 (2001)).

The Second Circuit adopted the Seventh Circuit's analytical framework. In the Second Circuit's view, the explicit grant of authority in Section 2 of the Twenty-First Amendment "should not . . . be subordinated to the dormant Commerce Clause." Pet. App. 16a. This view was based in part on the Amendment's historical origins as a response to a series of Supreme Court decisions invalidating state alcohol importation laws under the dormant Commerce Clause. *Id.* at 14a-16a (citing *Bowman v. Chicago & N.W. Ry Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Rhodes v. Iowa*, 170 U.S. 412 (1898)). These decisions had led first to the adoption by Congress of the Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2001)), and then to the adoption in 1913 of the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2000)), which was interpreted as having effectively divested alcoholic beverages of "their interstate commerce character." *James Clark Distilling Company v. Western Maryland Ry. Co.*, 242 U.S. 311, 325 (1917). The Second Circuit found

that, against this historical background, there could be little doubt that the Twenty-First Amendment, which closely tracks the text of the Webb-Kenyon Act, was intended to grant the States powers over the importation of alcohol that they would not otherwise have enjoyed under the dormant Commerce Clause. Pet. App. 14a-16a.

Applying these principles, the Second Circuit held that New York's ABC law falls within the scope of the Twenty-First Amendment's grant of authority and thus is exempt from dormant Commerce Clause scrutiny. *Id.* at 25a. The challenged statutory scheme, the court concluded, "regulates only the importation or distribution of alcohol in [the State]," "serves valid regulatory interests," and does not amount to "mere economic protectionism." *Id.*

Specifically, the Second Circuit found "no indication . . . that the regulatory scheme is intended to favor local interests over out-of-state interests." *Id.* "All wineries," the court said, "are permitted to obtain a license as long as the winery establishes a physical presence in the state." *Id.* The court also found that the physical presence requirement imposed on out-of-state wineries who sought a license was intended to serve legitimate regulatory goals. Presence "ensures accountability" by making "[r]ecords of sales and compliance with New York's regulatory requirements . . . available for inspection by SLA officials" and by making violators more readily subject to disciplinary measures. *Id.* at 25a-26a.

The Second Circuit further held that because New York's direct shipping ban did not discriminate on the basis of residency, it did not violate the Privileges and Immunities Clause. *Id.* at 29a-30a.

ARGUMENT

This Court should grant the questions regarding whether New York's direct shipment ban falls within the powers conferred by the Twenty-First Amendment and, if not, whether the ban violates the dormant Commerce Clause. There is a substantial conflict among the circuits as to the proper analytical framework for deciding such challenges, as well as a conflict as to the constitutionality of state direct shipment bans.

The Second and Seventh Circuits, acknowledging that section 2 of the Twenty-First Amendment uniquely protects state regulation of alcoholic beverages that might otherwise be suspect under the dormant Commerce Clause, have upheld direct shipment bans. In contrast, the Fourth, Fifth, Sixth, and Eleventh Circuits have articulated a two-step analysis for resolving these challenges. This approach first applies traditional dormant Commerce Clause scrutiny to state regulation of alcoholic beverages, and then asks if a statute that runs afoul of the Commerce Clause is "saved" by the Twenty-First Amendment. Applying this standard, these circuits have invalidated direct shipping bans.[2]

2. The Eleventh Circuit remanded its case for further fact-finding to determine if the ban advanced any legitimate state interests protected by the Twenty-First Amendment. *Bainbridge*, 311 F.3d at 1115-16. The remaining courts further divided over the appropriate remedy; the Fifth Circuit set aside Texas' direct shipment ban in its entirety (as applied to both in-state and out-of-state wineries), but the Fourth Circuit invalidated only certain exceptions to North Carolina's ban that were provided to in-state wineries alone.

Currently before this Court are petitions seeking review from the Sixth Circuit's decision invalidating Michigan's direct shipment ban. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *petitions for cert. filed sub noms., Granholm v. Heald*, No. 03-1116 (docketed Feb. 4, 2004), and *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (docketed Feb. 4, 2004). Michigan's direct shipment statute differs from the New York statute upheld by the Second Circuit in respects that are relevant, and perhaps dispositive, of the questions related to the dormant Commerce Clause presented in both this case and *Heald*. Unlike Michigan law, New York law clearly permits out-of-state wineries to obtain a license for making direct shipments on the same terms as in-state wineries, provided that they maintain a physical presence in the State. *Compare Heald*, 342 F.3d at 521 *with* ABC Law §§ 3(37), 76(4), 77(2); *see also* Pet. App. 7a-8a. Should the Court deem the split among the circuits sufficient to warrant certiorari, it should grant the petitions in both cases in order to have before it well-developed records that elucidate this difference.

As to petitioner's Privileges and Immunities Clause claim, the Second Circuit's decision fully comports with the precedents of this Court. Nor is there any split among the circuits on this question. Accordingly, the Court should deny certiorari as to this question.

I.

THERE IS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS REGARDING THE INTERPLAY BETWEEN THE TWENTY-FIRST AMENDMENT AND THE DORMANT COMMERCE CLAUSE

The split among the circuits as to the interplay between the Twenty-First Amendment and the dormant Commerce Clause appears irreconcilable and is quickly deepening. Of the six circuits to have decided this issue in the last four years, the most recent decisions (from the Second and Sixth Circuits) are sharply divergent. Moreover, the analytical framework adopted by the Second Circuit had been advanced by the Seventh Circuit in the earliest of these cases, but was rejected by the circuits that rendered decisions in the interim. Because the petitions pending in the Second and Sixth Circuit cases, taken together, present the Court with legal approaches and statutory regimes that are meaningfully different, a grant of certiorari in both of these cases is appropriate to resolve the conflict.

As the Second Circuit frankly acknowledged, the analyses used by the various circuits that have reviewed dormant Commerce Clause challenges to state regulation of alcoholic beverages are fundamentally inconsistent. Pet. App. 12a-13a. The Second Circuit explicitly declined to adopt the analysis of the Fourth, Fifth, Sixth, and Eleventh Circuits: "We think this two-step approach is flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of

section 2." *Id.* The Second Circuit instead adopted the approach that the Seventh Circuit had employed in *Bridenbaugh*. *Id.* at 13a.

In *Bridenbaugh*, the Seventh Circuit upheld an Indiana statute that "makes unlawful all direct shipments from out of state to Indiana consumers by any person in the business of selling alcoholic beverages in another state or country." *Bridenbaugh*, 227 F.3d at 849 (internal quotation omitted). The court rejected the plaintiffs' narrow interpretation of the Twenty-First Amendment, which would have required the invalidation under the dormant Commerce Clause of any state importation law not justified by the "core concerns" underlying the Amendment: "our guide is the text and history of the Constitution," the court said, "not the 'purposes' or 'concerns' that may or may not have animated its drafters." *Bridenbaugh*, 227 F.3d. at 851. Relying on the Amendment's history, the court concluded that the dormant Commerce Clause no longer forecloses state regulation of "direct shipments from out-of-state sellers to consumers that by-pass state regulatory (and tax) systems." *Id.* at 853. The court said that scrutiny of these laws under the dormant Commerce Clause would make the amendment "a dead letter," since importation regulations are discriminatory almost by definition: "Every use of § 2 could be called 'discriminatory' in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter." *Id.*

The Second Circuit, relying on the Twenty-First Amendment's legal history and jurisprudence, agreed with

the Seventh Circuit that the analysis of a state regulation governing alcohol importation must begin with a determination of whether it falls within the powers expressly conferred by the Twenty-First Amendment. Pet. App. 13a. This "mode of inquiry," the court explained, "considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is excepted from the effect of the dormant Commerce Clause." *Id.* "The inquiry, in our view, should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment." *Id.*

The rigid two-step framework adopted by the Fourth, Fifth, Sixth, and Eleventh Circuits diverges sharply from the framework used by the Second and Seventh Circuits. *See Heald*, 342 F.3d at 526-27 (noting criticism of *Bridenbaugh*); *Bainbridge*, 311 F.3d at 1114 n.15 ("We disagree with the analytical framework used in [*Bridenbaugh*]. . . ."). These courts have first considered whether a direct shipment ban survives traditional dormant Commerce Clause scrutiny; *i.e.*, whether it discriminates against interstate commerce or imposes burdens on interstate commerce that are incommensurate with putative local gains. *Heald*, 342 F.3d at 524-25; *Dickerson*, 336 F.3d at 395-400; *Beskind*, 325 F.3d at 514-16; *Bainbridge*, 311 F.3d at 1108-10. Only then have these courts asked whether an otherwise-invalid alcohol regulation might be "saved" by advancing one of the Twenty-First Amendment's "core concerns." *Heald*, 342 F.3d

at 525-26; *Dickerson*, 336 F.3d at 403-06; *Beskind*, 325 F.3d at 516-17; *Bainbridge*, 311 F.3d at 1111-13. With respect to the second step of this inquiry, the Fourth, Fifth, and Sixth Circuits have characterized their own test as requiring "strict scrutiny" of state importation regulations. *See Heald*, 342 F.3d at 524; *Dickerson*, 336 F.3d at 396; *Beskind*, 325 F.3d at 515. By comparison, the Eleventh Circuit has applied a less stringent standard, requiring that the challenged ban be "closely related" to a core Twenty-First Amendment power to survive review. *Bainbridge*, 311 F.3d at 1106.[3]

The circuits that have invalidated direct shipment bans are further split over the question of remedy -- an issue which has tremendous implications for State enforcement efforts, *see infra* pp. 19-20. After striking down North Carolina's ban on direct shipment, the Fourth Circuit concluded that the appropriate remedy for the State's discriminatory treatment of out-of-state wineries was the invalidation of the exception permitting local wineries to ship directly to consumers, rather than the invalidation of the State's general ban on direct shipment. *Beskind*, 325 F.3d at 517-520. In contrast, the Fifth Circuit concluded that the better way to remedy the supposed discrimination against out-of-state wineries was to "extend[] benefits" equally, not to "equaliz[e] burdens"; accordingly, the court enjoined the State from enforcing its ban on direct shipment against either in-state or out-of-state wineries. *Dickerson*, 336 F.3d at 407-09.

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3. The Eleventh Circuit has held that the State must demonstrate only that "its statutory scheme is genuinely needed to effectuate the proffered core concern"; it is not required to show the absence of "nondiscriminatory alternatives." *Bainbridge*, 311 F.3d at 1114 & n.17. *Cf. Heald*, 342 F.3d at 524-26 (requiring that State's action be narrowly tailored to least restrictive alternative); *Beskind*, 325 F.3d at 515; *Dickerson*, 336 F.3d at 406.

II.

THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, AND ELEVENTH CIRCUITS MISAPPREHEND THIS COURT'S TWENTY-FIRST AMENDMENT PRECEDENTS

The decisions of the Fourth, Fifth, Sixth, and Eleventh Circuits misapprehend this Court's precedents defining the scope of the Twenty-First Amendment. The two-step framework adopted by these circuits largely rests on their undue reliance on a single case, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *See Heald*, 342 F.3d. at 523-24; *Dickerson*, 336 F.3d at 400; *Beskind*, 325 F.3d at 514; *Bainbridge*, 311 F.3d at 1108. But as the Second Circuit held, *Bacchus* and other recent cases of this Court interpreting the Twenty-First Amendment can readily be reconciled with, and should be read in light of, the long line of Supreme Court decisions that preceded them. Pet. App. 19a-24a. *Cf. Heald*, 342 F.3d at 522 (characterizing Michigan's reliance on older precedent as "disingenuous at best"). While *Bacchus* prohibits the States from adopting alcoholic beverage regulations that constitute "mere economic protectionism," *Bacchus*, 468 U.S. at 276, neither it nor any of this Court's other precedents can be read to eviscerate the explicit grant of authority conferred upon the States by Section 2 of the Twenty-First Amendment.

Section 2 gives the States broad authority to regulate the importation of alcoholic beverages. It provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As this Court has explained, "[t]he wording of § 2 . . . closely follows the Webb-Kenyon

and Wilson Acts," and was directed toward the same end: "to reinvigorat[e] the State's regulatory role" following a series of this Court's decisions that had relied on the dormant Commerce Clause to invalidate State alcohol importation laws. *Craig v. Boren*, 429 U.S. 190, 205-06 (1976) (citing *Leisy*, 135 U.S. 100 (invalidating Iowa law that banned the sale of alcohol whether produced within or without the State)); *see also Bowman*, 125 U.S. 465 (invalidating Iowa law that required common carrier importing alcohol for resale to obtain a permit); *Rhodes*, 170 U.S. 412 (invalidating Iowa law that prohibited common carrier from delivering alcohol to an unlicensed person within the State).

Accordingly, though the Twenty-First Amendment did not circumscribe Congress's affirmative power to legislate on matters affecting interstate commerce, *see Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), it had a profound effect on the Commerce Clause's negative implications for State regulation of alcohol importation. The Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Indeed, this Court has characterized "[t]he States' regulatory power over this segment of commerce" as "largely 'unfettered by the Commerce Clause.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-15 (1996) (quoting *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939)).

Admittedly, the power conferred upon the States by the Twenty-First Amendment is not wholly unfettered by the Commerce Clause. For example, state alcohol regulations

that "have the practical effect of regulating liquor sales in other States" will run afoul of the Commerce Clause. *Healy v. Beer Institute*, 491 U.S. 324, 342 (1989) (affirming *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 585 (1986)). Likewise, the Commerce Clause may bar state regulations that are intended solely to protect local industry from out-of-state competition. *See Bacchus*, 468 U.S. at 271 (noting Hawaii's admission that "the purpose of the [challenged excise tax] exemption was to aid Hawaiian industry"). Additionally, the Court has held that the Twenty-First Amendment does not shield state regulations from challenge under the Equal Protection Clause, *Craig*, 429 U.S. at 208-09, or the First Amendment, *44 Liquormart*, 517 U.S. at 516.

But this Court has made clear that concerns about economic protectionism in no way swallow the Twenty-First Amendment whole. Thus, as the Second Circuit held, while this Court has

> "limited" the scope of Section 2 only insofar as it related to a state's attempt to regulate the traffic of alcohol outside of its borders or in violation of other powers reserved to the federal government[,] . . . the Court [has] unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders, it "primarily created an exception to the normal operation of the dormant Commerce Clause."

Pet. App. 23a (quoting *Craig*, 429 U.S. at 206).

The framework used by the Fourth, Fifth, Sixth, and Eleventh Circuits simply misapprehends this basic jurisprudential principle. Under the first step of this

framework, nearly any regulation governing the importation of alcohol arguably will qualify as "discriminatory." *See Bridenbaugh*, 227 F.3d at 848. But it was this very susceptibility to classification as "discriminatory" that led to the repeated invalidation of alcohol importation regulations in the late nineteenth century. Pet. App. 14a. And it was this invalidation that led, in turn, to the adoption of the Wilson and Webb-Kenyon Acts and Section 2 of the Twenty-First Amendment. *Id.* at 14a-15a.

Nor does the second step of this analysis give proper weight to the extensive powers accorded the States by the Twenty-First Amendment. This Court has held that Section 2 of the Twenty-First Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Hostetter*, 377 U.S. at 330; *State Board of Equalization v. Young's Market* Co., 299 U.S. 59 (1936). In the face of this precedent, the Fourth, Fifth, Sixth, and Eleventh Circuits have held that the Twenty-First Amendment can save a "discriminatory" statute only if the law advances one of the Amendment's "core concerns." *See Heald*, 342 F.3d at 524-26; *see also Dickerson*, 336 F.3d at 406; *Beskind*, 325 F.3d at 517; *Bainbridge*, 311 F.3d at 1114. All of these courts but the Eleventh Circuit will then uphold a statute only if that core concern "cannot be adequately served by reasonable nondiscriminatory alternatives." *Heald*, 342 F.3d at 527; *see also Dickerson*, 336 F.3d at 406; *Beskind*, 325 F.3d at 517.[4]

4. Of course, the States may seek to preserve legislation regulating any product which lacks a connection to the Twenty-First (Cont'd)

The Second Circuit, in contrast, has accorded appropriate weight to the "clear and unambiguous language of section 2." Pet. App. 13a. It has given the States authority to regulate the importation of alcohol in the service of "valid regulatory interests," while at the same time declaring impermissible state regulation that is designed merely to hinder competition. *Id.* at 25a. That this understanding of the Twenty-First Amendment will lead courts to uphold regulation of alcoholic beverages which might not otherwise survive Commerce Clause scrutiny is not a strike against it, as the plaintiffs appear to assume. *See* Pet. at 21. Rather, it is the whole point of the Twenty-First Amendment, as interpreted and applied by this Court.

III.

NEW YORK'S DIRECT SHIPMENT BAN IS CONSTITUTIONAL EVEN UNDER THE ANALYSIS USED BY THE FOURTH, FIFTH, SIXTH, AND ELEVENTH CIRCUITS

Even applying the two-step test advanced by the Fourth, Fifth, Sixth, and Eleventh Circuits, New York's statutory scheme for regulating direct shipment of alcoholic beverages would be fully constitutional. Apparently unlike the

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(Cont'd)

Amendment "by showing that [the statute] advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives." *See, e.g., New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

regulatory regime at issue in *Heald*, New York's regulatory regime permits an out-of-state winery to obtain a license authorizing direct shipment to consumers if the winery establishes a physical presence within the state. *Compare* ABC Law § 3(37) *with Heald*, 342 F.3d at 521 (noting Michigan's statement that "there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents"); *see also Beskind*, 325 F.3d at 516 (making license available upon satisfaction of physical presence requirement would cure constitutional infirmity). This aspect of New York's scheme fundamentally alters the constitutional calculus.

The relevant provisions of the ABC law comport with the dormant Commerce Clause. New York's alcohol regulatory regime is not facially discriminatory. The ABC Law specifies that *all* wine sold to consumers in New York, whether produced in New York or out of state, is required to pass through parties licensed by the SLA. *See* ABC Law § 100(1) ("No person shall . . . sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."). Sections 102(1)(c) and (d) simply make clear that alcoholic beverages are not exempt from the strictures of the ABC Law merely because they are shipped into New York from outside the State. As the Second Circuit observed, "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long the winery establishes a physical presence in the state." Pet. App. 25a; *see also* ABC Law § 3(37).

Nor does the ABC Law have a discriminatory effect on interstate commerce, since New York's law permits an out-

of-state winery to obtain a license to ship directly to consumers. Indeed, in striking down North Carolina's regulatory regime, the Fourth Circuit suggested that a regime with exactly the option provided for under New York's law — "requiring out-of-state wineries to import their wine into North Carolina to an in-state location and . . . treating that location in the same manner as it treats in-state winery locations" — would pass constitutional muster. *Beskind*, 325 F.3d at 516; *see also Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 212 (2d Cir. 2003) ("[E]ven if the Plaintiffs' evidence did demonstrate that it would be 'unworkable' and 'uneconomic' for them to establish brick-and-mortar outlets in New York, that is insufficient to establish a discriminatory effect."); *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1107-08 (3d Cir. 1997) (New Jersey requirement that practicing attorneys have a "bona fide office" in the state did not discriminate against out-of-state attorneys so as to violate the dormant Commerce Clause).

Furthermore, the challenged provisions of the ABC Law do not impose burdens on interstate commerce that are incommensurate with local benefits. Indeed, it is doubtful whether the law imposes any burden whatsoever on "interstate commerce," as distinct from a burden that might be felt by particular interstate firms. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations"). New York wine wholesalers, in addition to offering at least 47 brands from New York wineries, offer a wide range of out-of-state wines, including at least 49 brands from Oregon wineries, 39 brands from Washington State, more than 750 brands from California,

and more than 3,600 brands from abroad. Jt. App. 1438, 1480.[5] Indeed, the availability of out-of-state brands of wine increased significantly between 1991 and 2001. *Id.* at 1438, 1481. The dormant Commerce Clause simply does not guarantee a market structure in which smaller, lesser-known out-of-state firms will be as successful in selling their products as larger ones. *See Exxon*, 437 U.S. at 127.

Any burden on interstate commerce that may exist is more than justified by important state interests. Stringent licensing requirements are a critical means through which New York secures compliance with its laws and regulations relating to alcoholic beverages, including those relating to collection of taxes and minimum age requirements. Jt. App. 1556-58, 1561-62. Enforcement of these requirements, in turn, decreases underage drinking, alcohol-related motor vehicle accidents, and chronic heavy drinking. *Id.* at 1374-80, 1520-26. It would be difficult, if not impossible, for the State to enforce these stringent licensing requirements against firms that lack any physical presence in the State. As the Second Circuit pointed out, a firm's presence facilitates both the inspection of required records and the imposition of disciplinary measures. Pet. App. 25a-26a. Thus, "[r]equiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless." *Id.* at 28a.

These concerns about accountability are not just talk. New York's SLA has a very active enforcement program, with 2,025 charges for selling alcoholic beverages to minors sustained in 2000. Jt. App. 1562. That same year, a total of

5. "Jt. App." refers to the Joint Appendix filed in the Court of Appeals.

4,793 matters were referred to the SLA's Office of Counsel to commence disciplinary proceedings against licensees. *Id.* at 1579. The SLA disposes of thousands of disciplinary matters, and conducts thousands of investigations and hundreds of inspections of licensed premises annually. *Id.* at 1561-62, 1577-80, 1593, 1605, 1613, 1631-37, 1672-8, 1680-81, 1701-08, 1711-12. Permitting wineries with no presence in New York to obtain licenses to sell alcoholic beverages in New York would result in the entry into the market of more entities than the SLA could feasibly supervise and hold accountable. In any event, New York's interests are indubitably "core concerns" protected by the Twenty-First Amendment, and thus would "save" New York's regulatory regime from invalidation.[6]

IV.

PETITIONERS' PRIVILEGES AND IMMUNITIES CLAIM DOES NOT WARRANT REVIEW BY THIS COURT

Regardless of whether the Court grants certiorari on the questions related to plaintiffs' Commerce Clause claim, it should decline to review plaintiffs' Privileges and Immunities Clause claim. The circuits are not divided on this issue, and petitioners do not assert a split. *See* Pet. at 24-27.

In any event, New York's regime for regulating alcoholic beverages does not violate the Privileges and Immunities Clause. This clause prohibits states from discriminating on

6. As part of his 2004 budget package submitted to the New York State Legislature, the Governor of New York has proposed enactment of legislation that would, *inter alia*, permit out-of-state wineries located in states with reciprocal privileges to directly ship wine to New York residents. Given the inherent uncertainty surrounding the enactment of any proposed legislation, this proposal has no effect on the cert-worthiness of this case.

the basis of state citizenship or residency. *See* U.S. Const. art. IV, § 2, cl. 1. Though New York's alcohol regulatory regime requires a wine producer to establish a physical presence in the State in order to obtain a license for shipping wine directly to state residents, this requirement applies equally to residents and non-residents. *See* ABC Law § 3(37). Because the "statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents," it does not even implicate the Privileges and Immunities Clause. Pet. App. 29a.

The Second Circuit's conclusion on this point is consistent with other decisions upholding "presence" requirements in the face of a Privileges and Immunities Clause challenge. For example, this Court has indicated that requiring attorneys to maintain an office within a state as a condition of practicing law would not violate the Privileges and Immunities Clause. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 69-70 (1988) (invalidating attorney residency requirement but identifying "office requirement" as a viable and preferable alternative); *see also Tolchin*, 111 F.3d at 1113 (upholding similar New Jersey rule).[7]

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7. This Court does not appear to have construed the Privileges and Immunities Clause to protect a person who remains in one State, but demands the benefits he might obtain by being physically present in another. *See, e.g., Saenz v. Roe*, 526 U.S. 489 (1999) (holding that Clause protects "nonresidents who *enter* a State . . . to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing," (internal citations omitted; emphasis added)); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (observing that the Privileges and Immunities Clause "was designed to insure to a citizen of State A who *ventures into* State B the same privileges which the citizens of State B enjoy") (emphasis added).

Petitioners also err in assuming that an expansive interpretation of the Privileges and Immunities Clause would overcome the powers granted to the States by Section 2 of the Twenty-First Amendment. *See* Pet. at 25. This Court has held that the Twenty-First Amendment does not trump individual rights guaranteed by the Equal Protection Clause, *Craig*, 429 U.S. at 208-209, or by the First Amendment, *44 Liquormart*, 517 U.S. at 516. It also has acknowledged that the Twenty-First Amendment may limit the effect of constitutional provisions other than the Commerce Clause, at least where the State's "transparently clear" authority over importation is at issue and the only rights at stake are "purely economic." *Craig*, 429 U.S. at 206-07. Thus, even if this Court were to adopt the petitioners' novel and expansive interpretation of the Privileges and Immunities Clause, its reach would appropriately be limited by the dictates of the Twenty-First Amendment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari limited to the questions whether New York's ban on direct shipment of alcoholic beverages by unlicensed out-of-state wineries is within the powers conferred by the Twenty-First Amendment and, if not, whether the ban violates the dormant Commerce Clause. The Court should deny the question whether the ban violates the Privileges and Immunities Clause.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JUANITA SWEDENBURG, IN HER OWN CAPACITY, *ET AL.*,

Petitioners,

v.

EDWARD D. KELLY, CHAIRMAN OF THE STATE LIQUOR AUTHORITY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE OF NEW YORK, IN HIS OFFICIAL CAPACITIES, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Whether New York may ban direct shipments of alcoholic beverages from unlicensed, out-of-state suppliers to in-state consumers as an exercise of its authority under the Twenty-first Amendment.

2. If not, whether New York's direct shipping ban or the exceptions to it violate the dormant Commerce Clause or the Privileges and Immunities Clause of Article IV.

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellees below, are Juanita Swedenburg, in her own capacity, Juanita Swedenburg, as proprietor of Swedenburg Winery, a Virginia partnership, David Lucas, in his own capacity, David Lucas, as proprietor of The Lucas Winery, a California sole proprietorship, Patrick G. Fitzgerald, Cortes DeRussy, and Robin Brooks. Juanita Swedenburg is a Virginia resident, David Lucas is a California resident, and Patrick G. Fitzgerald, Cortes DeRussy, and Robin Brooks are New York residents.

State respondents, defendants-appellants below, are State of New York officials Edward F. Kelly, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacity, and Lawrence J. Gedda and Joseph Zarriello, Commissioners of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities.

Private respondents, intervenor-defendants-appellants below, are Charmer Industries, Inc., Peerless Importers Inc., Premier Beverage Company LLC, and Eber Brothers Wine and Liquor Corp., each a New York-licensed alcoholic beverage wholesaler, Local 2D of the Allied Food and Commercial Workers International Union, a union comprised of commissioned alcoholic beverage salespeople in the New York-metropolitan area, and Metropolitan Package Store Association, Inc., a trade association of New York-licensed alcoholic beverage retailers.

RULE 29.6 STATEMENT

Respondent Charmer Industries, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Peerless Importers Inc. has one privately held parent corporation, Little Quaker Corp., which owns 100% of Peerless Importers Inc. Quaker Equities Ltd., also privately held, owns 100% of Little Quaker Corp. There is no publicly held company that owns 10% or more of any stock in Peerless Importers Inc.

Respondent Eber Brothers Wine & Liquor Corp. has one privately held parent corporation, Eber Bros. & Co., which owns 100% of Eber Brothers Wine & Liquor Corp. There is no publicly held company that owns 10% or more of any stock in Eber Brothers Wine & Liquor Corp.

Respondent Premier Beverage Company LLC has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Metropolitan Package Store Association, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Local 2D of the Allied Food and Commercial Workers International Union has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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BRIEF FOR PRIVATE RESPONDENTS

The private respondents respectfully submit that the petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 358 F.3d 223 (2d Cir. 2004). The opinion of the district court granting summary judgment for petitioners (Pet. App. 34a-71a) is reported at 232 F. Supp. 2d 135 (S.D.N.Y. 2002). The order of the district court entering judgment for petitioners (Pet. App. 72a-73a) is not reported.

JURISDICTION

The judgment below was entered on February 12, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Shortly after Prohibition's repeal in 1933 by the Twenty-first Amendment, New York enacted its Alcoholic Beverage Control Law ("ABC Law"), N.Y. Alco. Bev. Cont. Law §§ 1 *et seq.* (McKinney 2000 & Supp. 2004). As did most States, New York adopted a "three-tier" regulatory system for distribution of alcoholic beverages. Under this system – the heart of which is found in ABC Law §§ 102(1)(c) and (d) – all alcoholic beverages imported into New York must be shipped to parties licensed by and, thus, accountable to, the State. Specifically, out-of-state producers of alcoholic beverages sell their products to New York-licensed wholesalers, who then sell them to New York-licensed retailers, who, in turn, sell them to in-state consumers. Thus, under New York's ABC Law, unlicensed, out-of-state purveyors of alcohol cannot legally ship their products to consumers located within New York State. In contrast, the ABC Law does permit licensed, in-state wineries to ship alcohol di-

rectly to in-state consumers. These same licenses also are available to out-of-state wineries, provided they establish a presence in New York and comply with its laws.

2. On February 3, 2000, petitioners Juanita Swedenburg and David Lucas, proprietors of wineries located in Virginia and California, respectively, and petitioners Patrick Fitzgerald, Cortes DeRussy, and Robin Brooks, three wine consumers resident in New York, filed suit against three officials from the New York State Liquor Authority – the agency charged with administering and enforcing the ABC Law – in the United States District Court for the Southern District of New York. Petitioners sought a declaration that ABC Law §§ 102(1)(c) and (d) were unconstitutional under the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV because they prohibit unlicensed wineries from shipping their wine products directly to New York consumers, while other provisions of the ABC Law permit licensed, in-state wineries to make such shipments.[1]

Thereafter, private respondents were granted leave to intervene in the action as defendants, and the parties cross-moved for summary judgment. The district court granted petitioners' motion. Pet. App. 34a. Relying on the two-tier analysis used by a number of other federal courts in similar challenges, the district court first found that New York's regime directly discriminated against interstate commerce. *Id.* at 53a-54a. The court then held that New York's ban on direct shipment of out-of-state wine by unlicensed wineries did not "implicate the State's core concerns under the Twenty-

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[1] Petitioners also contended, and both the district court and Second Circuit held, that ABC Law § 102(1)(a) violated the First Amendment insofar as it impermissibly banned out-of-state purveyors of alcoholic beverages from soliciting orders from New York consumers. This issue is not before the Court.

first Amendment" and, thus, the ban was not insulated from invalidation under the dormant Commerce Clause. *Id.* at 59a. The court did not reach petitioners' assertion that New York's law also violated the Privileges and Immunities Clause of Article IV.

After further submissions and oral argument regarding the appropriate remedy for the dormant Commerce Clause violation, the district court entered judgment enjoining the State respondents from enforcing ABC Law §§ 102(1)(c) and (d) with respect to wine. Pet. App. 72a. The district court, however, stayed its judgment pending appeal. *Id.* at 73a.

3. Respondents timely appealed to the Second Circuit, a unanimous panel of which reversed the district court's decision with respect to petitioners' dormant Commerce Clause and Privileges and Immunities Clause claims.

a. The Second Circuit began its analysis by recognizing that "[f]ive other circuits have decided similar cases" recently. *Id.* at 11a & n.6. (citing *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *petitions for cert. filed sub noms. Granholm v. Heald*, No. 03-1116 (docketed Feb. 4, 2004), and *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (docketed Feb. 4, 2004); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)). In each of these cases, plaintiffs challenged a state regulatory scheme that prohibited out-of-state wineries from shipping their wines directly to in-state consumers, but permitted local wineries to make such shipments.

The Second Circuit further recognized that two distinct modes of analysis had developed among the courts in addressing this issue. Under one mode of analysis – applied by the Fourth, Fifth, Sixth, and Eleventh Circuits, and by the district court below – the challenged statute is first examined in the context of the dormant Commerce Clause to determine

whether the statute discriminates against or unduly burdens interstate commerce. Pet. App. 12a. If the statute is found to violate the dormant Commerce Clause, the court then considers whether the statute nevertheless can be "saved" by the Twenty-first Amendment. For the statute to be "saved," it must be found to advance one of the Twenty-first Amendment's "'core concerns.'" *Id.* Applying this two-step approach, these circuit courts, and the district court in this case, struck down the regulatory schemes in question.[2]

Rejecting this mode of analysis as "flawed" because it failed to give proper deference to the authority granted the States by Section 2 of the Twenty-first Amendment, the Second Circuit adopted the approach of the Seventh Circuit in *Bridenbaugh*. *Id.* at 12a-13a ("We adopt this approach acknowledging that only one other circuit court has employed it in a similar case.") (citing *Bridenbaugh*, 227 F.3d 848). This "mode of inquiry considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause." *Id.* at 13a.

b. Explaining its focus on the Twenty-first Amendment, the Second Circuit focused first on the "[l]egal [h]istory" of that Amendment. *Id.* at 14a. The court noted that because the States' pre-Prohibition efforts to control the production and consumption of alcohol often conflicted with this Court's dormant Commerce Clause jurisprudence, *see id.* (citing *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890)), Congress responded by enacting two statutes designed to expand state power. In

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[2] The Eleventh Circuit in *Bainbridge* reversed the district court's dismissal of such a constitutional challenge to Florida's direct shipping ban and remanded the case for further factfinding.

the Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2000)), Congress gave States the authority to regulate imported liquor "'*to the same extent and in the same manner* as though such liquids or liquors had been produced in such State or Territory,'" and it provided that such liquor could "'not be exempt [from state regulation] by reason of being introduced therein in original packages or otherwise.'" Pet. App. 14a (quoting 27 U.S.C. § 121) (emphasis in original). Moreover, in the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2000)), Congress prohibited "'the shipment or transportation, in any manner or by any means whatsoever, of any . . . liquor of any kind, from one State . . . into any other State which . . . is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State.'" Pet. App. 15a (quoting 27 U.S.C. § 122) (omissions in original).

The court further noted that the language of Section 2 of the Twenty-first Amendment closely tracked the language of the Wilson and Webb-Kenyon Acts, providing that "'[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof'" is prohibited. *Id.* at 15a-16a (quoting U.S. Const. amend. XXI, § 2). In other words, as the court stated: "Section 2 effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Id.* at 16a.

c. Next, the court engaged in an historical analysis of this Court's Twenty-first Amendment jurisprudence. The court examined both "early" and "contemporary" lines of this Court's cases, and, disagreeing with appellate decisions such as *Heald*, found that *all* of this Court's cases support the proposition that Section 2 of the Twenty-first Amendment grants States the plenary authority to regulate the transportation or importation of alcohol within their borders. Pet. App.

18a-19a, 23a-24a; *id.* at 23a (stating that in each of its contemporary cases this "Court unequivocally reaffirmed the principle that insofar as section 2 [of the Twenty-first Amendment] permits each state to regulate alcohol traffic within its borders it 'primarily created an exception to the normal operation of the Commerce Clause.'" (quoting *Craig v. Boren*, 429 U.S. 190, 206 (1976)).

d. Applying these principles to the challenged statute, the Second Circuit held that "New York's regulatory regime falls squarely within the ambit of section 2's grant of authority." *Id.* at 25a. The court further found that (i) New York's statutory scheme "regulates only the importation and distribution of alcohol in New York," (ii) "New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests," (iii) there was "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests," (iv) New York's regulatory scheme was not discriminatory because "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state," and (v) the ABC Law's mandate that all licensees establish a physical presence in the State served valid regulatory functions such as ensuring that those trafficking in alcohol are accountable to the State. *Id.* at 25a-29a.

e. The Second Circuit, finding that New York's regulatory scheme did not discriminate on the basis of residency, then rejected petitioners' claim that, in addition to violating the dormant Commerce Clause, New York's prohibition against direct shipping also ran afoul of the Privileges and Immunities Clause of Article IV. *Id.* at 29a-30a.

f. The Second Circuit thus reversed the district court's grant of summary judgment in favor of petitioners on their dormant Commerce Clause and Privileges and Immunities Clause claims.

ARGUMENT

The petition should be granted because it raises recurrent and important constitutional issues having nationwide ramifications.

Principal among these issues is the scope of the authority granted the States under Section 2 of the Twenty-first Amendment to ban direct shipments of alcohol imports. There is a substantial conflict among the circuits that have addressed this fundamental issue, both as to the mode of analysis and as to the result. The Second and Seventh Circuits, applying the plain language of the Twenty-first Amendment, have upheld state direct shipping bans on alcohol imports. In contrast, the Fourth, Fifth, and Sixth Circuits, first applying a dormant Commerce Clause analysis to such regulations, have struck them down. The Eleventh Circuit, also first applying a dormant Commerce Clause analysis, remanded the case before it for further factfinding to determine whether such a direct shipping ban furthered any legitimate state interests protected by the Twenty-first Amendment. Moreover, those circuit courts that struck down state direct shipping restrictions on "dormant" Commerce Clause grounds failed to address the fact that Congress has affirmatively authorized the States to enact such bans – separate and apart from the rights that States enjoy under the Twenty-first Amendment. Accordingly, there is a compelling need for this Court to review these important issues.

Indeed, this Court now has before it petitions seeking review of the Sixth Circuit's decision striking Michigan's direct shipping ban. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *petitions for cert. filed sub noms. Granholm v. Heald*, No. 03-1116 (docketed Feb. 4, 2004), and *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (docketed Feb. 4, 2004). Although there is a significant degree of overlap in the issues raised by those petitions and by the petition in this case, this case also raises somewhat different issues because under New York law, unlike Michigan law, out-of-

state wineries may obtain licenses to ship their products on the same terms as in-state wineries simply by establishing a presence in the State.[3] Moreover, in reaching their respective holdings, the Second and Sixth Circuits employed different modes of analysis, with the Second Circuit focusing primarily on the Twenty-first Amendment and the Sixth Circuit focusing primarily on the dormant Commerce Clause. For these reasons, this Court's consideration of the related issues raised by all currently pending petitions may be illuminated by reviewing both the Second and Sixth Circuits' judgments in these cases, rather than one or the other. Given the num-

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[3] That factor may be significant in this Court's analysis. Thus, for example, although the Fourth Circuit applied a two-step analysis to invalidate an outright ban coupled with exceptions for in-state wineries, it agreed that a statutory scheme such as New York's that permits out-of-state wineries to obtain licenses allowing them to ship directly to in-state consumers would be constitutional. *See Beskind*, 325 F.3d at 516 ("North Carolina could satisfy its concerns by requiring out-of-state wineries to import their wine into North Carolina to an in-state location and by treating that location in the same manner as it treats in-state winery locations."); *see also* Pet. App. 13a n.7 (stating that "the Fourth Circuit offered a possible nondiscriminatory alternative to North Carolina's statute that is remarkably similar to the New York scheme").

Petitioners assert that "[n]o license is available to out-of-state producers to traffic in alcoholic beverages," but that contention is mistaken. Pet. 2. As the Second Circuit below expressly found: "All wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state." Pet. App. 25a. "Thus, unlike in other states, out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol." *Id.* at 8a (footnote omitted); *see also* N.Y. Alco. Bev. Cont. Law §§ 3(37), 76 (Pet. App. 86a-90a), 77(1)-(2), 96, 116; Jt. App. 1564-65, ¶ 43.

ber of issues raised by both judgments – and the number of public and private parties in each case – private respondents respectfully suggest that the Court grant review in both sets of petitions and, rather than consolidate them, set the two cases for argument in tandem.

I. There Is A Substantial Conflict Among The Courts Of Appeals As To The Relationship Between The Twenty-first Amendment And The Dormant Commerce Clause

By its plain language, Section 2 of the Twenty-first Amendment "prohibit[s]" the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend. XXI, § 2. Despite this clear language, the courts of appeals, faced with dormant Commerce Clause challenges to state statutes regulating the importation of alcoholic beverages, have sharply divided on the analytical framework to be employed and have reached starkly different outcomes depending on the methodology applied.[4] Moreover, even among those circuits that have found a constitutional infirmity, there is substantial conflict over the proper remedy: whether to strike a State's entire direct shipping ban or only the limited, in-state exceptions to that law.

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[4] Indeed, since 2000, six Courts of Appeals – those for the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits – have issued decisions involving challenges to state alcoholic beverage control laws that prohibit out-of-state wineries from shipping their wines directly to in-state consumers but permit local wineries to make such shipments. Four of these decisions were handed down within the last year alone.

A. The Second And Seventh Circuits' Mode Of Analysis

The opinion below represents the most recent decision by a federal appeals court addressing state regulation of alcohol imports. In its opinion, the Second Circuit flatly (and correctly) rejected as "flawed" the analysis adopted by the Fourth, Fifth, Sixth, and Eleventh Circuits focusing, in the first instance, on the dormant Commerce Clause "because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of section 2 [of the Twenty-first Amendment]." Pet. App. 12a-13a (footnote omitted).

Instead, the Second Circuit adopted the approach taken by the Seventh Circuit in *Bridenbaugh*, 227 F.3d 848. This "mode of inquiry considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause." *Id.* at 13a.

> The inquiry, in our view, should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment. Instead, the inquiry should be sensitive to the manner in which these two constitutional forces interact in light of the impact the Twenty-first Amendment has on dormant Commerce Clause concerns.

Id. at 13a-14a. "Allowing dormant Commerce Clause concerns to restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity." *Id.* at 16a.

In *Bridenbaugh*, plaintiffs challenged the constitutionality of an Indiana statutory scheme that prohibited the direct shipment of alcoholic beverages from out-of-state suppliers to in-state consumers. Focusing on the "text and history" of the Twenty-first Amendment, Judge Easterbrook wrote for the Seventh Circuit that the Indiana statute was a valid exercise of that State's plenary power under the Twenty-first Amendment, which directly authorizes States "to control alcohol in ways that it cannot control cheese." 227 F.3d at 851.[5]

> No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 [of the Twenty-first Amendment] speaks directly to these shipments. Indeed, all "importation" involves shipments from another state or nation. *Every* use of § 2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.
>
> No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.

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[5] Judge Easterbrook expressly rejected the parties' invitation in *Bridenbaugh* to consider the "'core purposes'" of Section 2 of the Twenty-first Amendment: "If 'core concerns' spelled the difference, we would follow the Supreme Court rather than district courts and student notes. But our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters." *Bridenbaugh*, 227 F.3d at 851.

Id. at 853 (emphasis in original). The Seventh Circuit so held, even though local Indiana wineries, like wineries in New York and some other States, are permitted to ship directly to in-state consumers while their out-of-state counterparts are not. *See id.* at 853 ("holders of Indiana wine wholesaler or retailer permits may deliver directly to consumers' homes"); *id.* at 851 ("Indiana permits local wineries, but not wineries 'in the business of selling . . . in another state or country,' to ship directly to Indiana consumers.") (omission in original).[6]

B. The Fourth, Fifth, Sixth, And Eleventh Circuits' Mode Of Analysis

Notwithstanding the plain language of the Twenty-first Amendment, the Fourth, Fifth, Sixth, and Eleventh Circuits essentially treat alcohol no differently for constitutional purposes than any other product. Presented with a dormant Commerce Clause challenge to a state alcohol importation law, those courts incorrectly applied a two-step analysis.

Those courts began with a traditional dormant Commerce Clause analysis, examining whether the statute in

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[6] Although plaintiffs in *Bridenbaugh* sought review of the Seventh Circuit's decision before this Court, the Court appropriately denied the petition, there being no split among the circuits at the time, and the Seventh Circuit having reached the correct holding after properly applying this Court's precedents. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (2000), *cert. denied sub nom. Bridenbaugh v. Carter*, 532 U.S. 1002 (2001). Review by this Court, however, is now urgently needed given the circuit split that has developed, and widened, since *Bridenbaugh* was decided. Moreover, as explained herein, this petition, together with the petitions in connection with *Heald*, represent the proper vehicles for this Court to resolve the split.

question affects interstate commerce in a manner that either (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local gains. *See Heald*, 342 F.3d at 524-25; *Dickerson*, 336 F.3d at 400; *Beskind*, 325 F.3d at 514; *Bainbridge*, 311 F.3d at 1108-09. If such a violation is found, the challenged statute may nonetheless be "saved" by the Twenty-first Amendment, but only if it advances one of the Amendment's "core concerns." *See Heald*, 342 F.3d at 524-26; *Dickerson*, 336 F.3d at 403-07; *Beskind*, 325 F.3d at 513-14; *Bainbridge*, 311 F.3d at 1108.[7]

Applying this two-tier analysis, those courts held that each of the challenged statutes regulating the importation of alcoholic beverages was facially discriminatory in violation of the dormant Commerce Clause. *Heald*, 342 F.3d at 525; *Dickerson*, 336 F.3d at 402-03; *Beskind*, 325 F.3d at 515; *Bainbridge*, 311 F.3d at 1109-11. Moreover, three of these courts held that the challenged statutes were not saved by the Twenty-first Amendment, *Heald*, 342 F.3d at 526-27; *Dickerson*, 336 F.3d at 403-07; *Beskind*, 325 F.3d at 516-17, and the remaining court remanded the case for further fact-finding, *see Bainbridge*, 311 F.3d at 1115-16.

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[7] In *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996), the D.C. Circuit, also applying a two-step analysis, found that the District of Columbia's statute at issue (requiring District-licensed wholesalers to store all alcoholic beverages within the District) would have otherwise violated the dormant Commerce Clause but that the statute was saved by the Twenty-first Amendment – even though the legislature operated with a "mixed motive" in enacting it – because the "legitimate state interests" promoted by the statute "fall[] squarely within the state's core enforcement powers over alcohol." *Id.* at 200-04.

1. The Substantial Conflict Among The Fourth, Fifth, Sixth, And Eleventh Circuits Over The Level Of Scrutiny To Be Applied In Connection With The Second Step Of Their Analysis

Although the Fourth, Fifth, Sixth, and Eleventh Circuits agreed that a two-step mode of analysis should apply to the review of a dormant Commerce Clause challenge to a State's ban on direct shipment of alcohol imports, they disagreed on the appropriate level of scrutiny to be applied in connection with the second step of determining whether the Twenty-first Amendment permits the State's actions. Specifically, the Fourth, Fifth, and Sixth Circuits applied a "strict scrutiny" standard typically seen in cases involving restrictions on speech to require the State's action to be "narrowly tailored" to the "least restrictive" alternative necessary to address the State's legitimate concerns. *See Heald*, 342 F.3d at 524-26; *Dickerson*, 336 F.3d at 406; *Beskind*, 325 F.3d at 514-16.[8]

In contrast, the Eleventh Circuit, recognizing that the Twenty-first Amendment mandates that substantial deference be afforded state statutes regulating the importation of alcohol, applied a "far" lower standard. *Bainbridge*, 311 F.3d at 1114 n.17. In the Eleventh Circuit's view, the State "need not show that there are no nondiscriminatory alternatives available." *Id.* Rather, it must demonstrate that its statutory scheme is "closely related" to a core power under the Twenty-first Amendment and not a pretext for mere economic protectionism – a burden that is "far less than the strict scrutiny required under a traditional tier-one [dormant Commerce Clause] analysis." *Id.* at 1106, 1114 n.17; *see also id.* at 1112-15.

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[8] In the decision reversed by the Second Circuit, the district court also applied a "strict scrutiny" standard. Pet. App. 51a-64a.

2. The Substantial Conflict Between The Fourth And Sixth Circuits Over The Proper Remedy Where A Violation Is Found

Although the Fourth and Sixth Circuits agreed on the two-step mode of analysis and the level of scrutiny to be applied in connection with the second step, they disagreed on the proper remedy to be applied where the challenged statute is found to be unconstitutional.

In *Beskind*, plaintiffs challenged the constitutionality of North Carolina's laws prohibiting out-of-state alcohol producers from shipping their products directly to in-state consumers but allowing in-state producers to make such shipments. Unlike New York, North Carolina did not provide a mechanism by which an out-of-state winery could obtain an in-state license that would permit it to ship directly to in-state consumers. *See Beskind*, 325 F.3d at 515. The Fourth Circuit found that "the *combination* of the prohibition of direct shipment and the law permitting local wineries to circumvent [that] prohibition" amounted to a dormant Commerce Clause violation. *Id.* at 518 (emphasis in original). Recognizing that state three-tier systems such as North Carolina's were "long-standing" "scheme[s] authorized by the Twenty-first Amendment," the Fourth Circuit preserved those provisions of North Carolina's regulatory scheme requiring alcoholic beverages to be imported through in-state, licensed parties – provisions enacted shortly after the 1933 repeal of Prohibition – and struck only the more recently enacted provisions allowing in-state producers to ship directly to in-state consumers. *Id.* at 516, 519.[9]

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[9] Even if New York's ABC Law were found to violate the dormant Commerce Clause because it permits licensed, in-state wineries to ship directly to in-state consumers while prohibiting unlicensed, out-of-state wineries from doing so, the only proper

The Sixth Circuit in *Heald* took a different approach. Like North Carolina, Michigan adopted a three-tier system of alcohol distribution shortly after the repeal of Prohibition and, decades later, adopted provisions permitting in-state producers to ship alcohol directly to in-state consumers. Unlike the Fourth Circuit, however, the Sixth Circuit effectively struck Michigan's long-standing three-tier system, and not the subsequently enacted exceptions permitting in-state producers to ship directly to in-state consumers. *See Heald*, 342 F.3d at 527-28.

C. Even Under The Fourth, Fifth, Sixth, And Eleventh Circuits' Mode Of Analysis, New York's Statute Would Be Constitutional Under Both The Dormant Commerce Clause And The Twenty-first Amendment

Even under the two-tier approach adopted by these other circuits, New York's statutory scheme would pass constitutional muster.

Focusing first on the Commerce Clause, New York's statutory scheme would not violate the dormant Commerce Clause. Indeed, the dormant Commerce Clause is not applicable here because Congress has repeatedly exercised its plenary power under the Commerce Clause and expressly au-

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remedy would be that which the Fourth Circuit employed in *Beskind* – that is, to sever and strike New York's in-state delivery exemptions, leaving intact its overall and long-standing prohibition on direct shipping. That is particularly so where, as here, the statute at issue contains a severability clause. *See* N.Y. Alco. Bev. Cont. Law § 161; *Leavitt v. Jane L.*, 518 U.S. 137, 143-44 (1996) (per curiam); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506-07 (1985); *see also McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40, 51-52 (1990).

thorized States to pass statutes such as ABC Law § 102.[10] For example, the Webb-Kenyon Act, which was enacted by Congress in 1913, and reenacted without change by Congress in 1935 *after* the end of Prohibition and ratification of the Twenty-first Amendment, is, by its very title, an "[a]n act divesting intoxicating liquors of their interstate character in certain cases." 27 U.S.C. § 122.[11] Moreover, in 2000, Congress, again acting pursuant to its plenary authority under the Commerce Clause, amended the Webb-Kenyon Act to authorize federal court injunctions to enforce state bans on direct shipments of alcohol from unlicensed, out-of-state purveyors to in-state consumers. *See* 27 U.S.C. § 122a (Twenty-first Amendment Enforcement Act, Pub. L. No. 106-386, § 2004, 114 Stat. 1464, 1546 (2000)). Thus, this congres-

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[10] The dormant aspect of the Commerce Clause arises from a negative inference from the constitutional grant to Congress to regulate commerce. U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause prohibits state laws that discriminate against or unduly burden interstate commerce *in the absence of express Congressional authorization*. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). Thus, it is axiomatic that the dormant Commerce Clause "only operates where the Federal Government has not spoken." *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986); *accord Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993).

[11] In clear and unambiguous terms, the Webb-Kenyon Act provides that the "shipment or transportation . . . of any . . . intoxicating liquor . . . from one State . . . into any other State . . . in violation of any law of such State . . . is prohibited." 27 U.S.C. § 122.

sional authorization precludes application of a dormant Commerce Clause analysis here.[12]

The Fourth, Fifth, Sixth, and Eleventh Circuits nevertheless applied a dormant Commerce Clause analysis to the challenged statutes before them. They all found that those statutes were discriminatory on their face and, thus, virtually *per se* invalid. *Heald*, 342 F.3d at 525; *Dickerson*, 336 F.3d at 402-03; *Beskind*, 325 F.3d at 515; *Bainbridge*, 311 F.3d at 1109-11.

In contrast, the Second Circuit recognized that, far from being facially discriminatory, New York's direct shipping ban applies evenhandedly to all shipments of alcoholic beverages, whether from within or without the State. Pet. App. 8a, 25a; *see also* N.Y. Alco. Bev. Cont. Law § 102(1)(c)-(e) (Pet. App. 80a-82a). Thus, New York's ABC Law is facially neutral. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003). Moreover, New York's limited exceptions that authorize licensed, in-state wineries to ship their wines directly to consumers are not discriminatory because, as the Second Circuit recognized, "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in

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[12] The Second Circuit below cited this congressional authorization. Pet. App. 15a. In contrast, the Eleventh Circuit rejected this congressional authorization argument on the flawed reasoning that it was a nullity in light of the Twenty-first Amendment's passage, even though this legislation was reenacted thereafter. *Bainbridge*, 311 F.3d at 1110-11. To the extent that other circuits (including the Sixth Circuit in *Heald*) ignored these federal statutes and looked first to the dormant Commerce Clause, they erred because the Twenty-first Amendment and statutes such as the Webb-Kenyon Act preclude application of the dormant Commerce Clause here.

the state." Pet. App. 25a. "Thus, unlike in other states, out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol. They must, however, comply with the licensing requirements of the ABC Law, including establishing and maintaining a physical presence in New York." *Id.* at 8a (footnote omitted). As the Second Circuit explained in upholding New York's identical cigarette distribution laws, "neither the [s]tatute's closure of a sales channel . . . nor the [s]tatute's delivery exemption discriminates against interstate commerce, facially or otherwise," *Brown & Williamson Tobacco*, 320 F.3d at 210, and the fact that out-of-state suppliers may find it "'unworkable' and 'uneconomic' for them to establish brick-and-mortar outlets in New York . . . is insufficient to establish a discriminatory effect," *id.* at 212 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978) (stating that "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations" and that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another")).[13]

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[13] Moreover, as even petitioners' experts acknowledged, the New York wine market is "already served by more competition than nearly any other." Jt. App. 851-52. Out-of-state wineries can distribute their products here by using any of New York's more than 200 licensed wholesalers, obtaining their own New York wholesale or winery license, or distributing through a licensed winery. *Id.* at 1459-60, ¶ 57, 1564-66, ¶¶ 43-44. As a result, more than 90% of all wine sold in New York comes from out-of-state. *Id.* at 851-54, 860, 862, 866, 1039-40, 1083-84, 1444-45, ¶¶ 26-27 & n.25. In fact, less than 1% of the wine sold in New York is direct shipped. *Id.* at 1444-46, ¶¶ 26, 28, 3936, ¶ 2, 3938-39, ¶ 10. Indeed, petitioners conceded below that New York's ABC Law

Furthermore, for the reasons previously explained, the Twenty-first Amendment saves New York's statute in any event. Indeed, as this Court has recognized, the States' "legitimate" interests protected by the Twenty-first Amendment include "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota v. United States*, 495 U.S. 423, 432 (1990).[14] Accordingly, under a proper analysis of the Commerce Clause and Twenty-first Amendment issues, New York's system would unquestiona-

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does not affect the "volume" of wine flowing into New York. Pls.' Br. at 33. That acknowledgement is ultimately fatal to their dormant Commerce Clause claim. *See Exxon*, 437 U.S. at 123 (finding that challenged Maryland statute did not burden interstate commerce because it did not affect "the total quantity of . . . products shipped into Maryland").

[14] The ample record below demonstrated that New York's three-tier system furthers all of those "legitimate" state "interests" protected by the Twenty-first Amendment. *Id.* at 432. By its very terms, New York's ABC Law effectuates "the policy of the state" of "fostering and promoting temperance" and "obedience to law." N.Y. Alco. Bev. Cont. Law § 2. It is undisputed here that New York's three-tier system provides an "extremely effective" means of ensuring tax collection, which increases the price to consumers and thereby reduces consumption among all drinkers, especially minors. Jt. App. 1418, ¶ 22, 1525, ¶ 25, 1376-78, ¶¶ 22-28, 867-68, 892-93. Moreover, the stricter a State's regulations regarding the distribution and sale of alcohol within the State, the lower the incidence of binge drinking among both minors and all drinkers. *Id.* at 763-64, ¶¶ 30-37, 1366-67. Conversely, total wine consumption per capita is a whopping 40% higher in States that permit direct shipping than in States such as New York that ban direct shipping of alcohol imports. *Id.* at 763-66, ¶¶ 30-39, 1252-1363, 1368-69.

bly be found constitutional even if this Court were to require examination of both issues.[15]

II. The Fourth, Fifth, Sixth, And Eleventh Circuits Misapply This Court's Twenty-first Amendment Jurisprudence

The Second Circuit's decision below and the Seventh Circuit's decision in *Bridenbaugh* are the only two decisions of the six that properly interpret and apply this Court's Twenty-first Amendment jurisprudence.

From the earliest days of the Twenty-first Amendment, this Court recognized that that Amendment created an exception to the normal operation of the dormant Commerce Clause with respect to alcohol imports. For example, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), a unanimous Court, upholding a California statute that imposed a licensing fee on those seeking to import beer into the State, stated: "The words used [in Section 2 of the Twenty-first Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." *Id.* at 62. Likewise, in *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court, again unanimously, upheld a Minnesota statute that imposed a maximum alcohol-content requirement on imported liquor, but not on liquor produced within the State, noting that "under the [Twenty-first] amendment, discrimination against imported liquor is permissible although it is not

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[15] As previously explained, the circuits applying this two-tier analysis are themselves split over the level of scrutiny to be applied in reviewing a Commerce Clause challenge to a State's alcohol importation law. There is no support whatsoever in this Court's jurisprudence for a "strict scrutiny" standard in this circumstance. In any event, New York's statute would have to be found constitutional under any of these standards of review.

an incident of reasonable regulation of the liquor traffic." *Id.* at 403 (citing *Young's Market*, 299 U.S. at 62, 63).

The Court reiterated this basic proposition three decades later in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964):

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . . This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.

Id. at 330 (citing, *inter alia*, *Young's Market*, 299 U.S. at 62).[16]

More recently, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), a unanimous Court stated: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110 (striking wine-pricing statute on Sherman Act grounds).[17]

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[16] Although the Court invalidated the statute at issue in *Hostetter* on dormant Commerce Clause grounds, it did so because the alcohol subject to the challenged regulation was not destined for "delivery or use" within the State and, thus, the Twenty-first Amendment was inapplicable. *Hostetter*, 377 U.S. at 325, 332-33.

[17] Other cases by this Court where it expressly recognized the States' power to regulate the importation of alcohol for deliv-

Thus, as the Second Circuit recognized, this Court has repeatedly and "unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders it 'primarily created an exception to the normal operation of the Commerce Clause.'" Pet. App. 23a (quoting *Craig v. Boren*, 429 U.S. 190, 206 (1976)) (footnote omitted).[18] This stands in sharp contrast to the

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ery or use within their borders include: *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *Carter v. Virginia*, 321 U.S. 131, 137 (1944); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

[18] *See also id.* at 23a n.11 ("*Accord, Healy* [*v. Beer Inst., Inc.*, 491 U.S. 324, 342 (1989)] (noting that section 2 authorizes state regulation of intrastate liquor traffic, and thus does not permit state laws that attempt to prescribe prices for out-of-state liquor sales); *Brown-Forman* [*Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986)] ("Section 2 of the Twenty-first Amendment . . . speaks only to state regulation of the transportation or importation into any State . . . for delivery or use therein of alcoholic beverages.") (internal quotation marks omitted); *Bacchus*, 468 U.S. at 282 (noting "we have consistently reaffirmed that understanding of the Amendment, repeatedly acknowledging the broad nature of state authority to regulate commerce in intoxicating liquors"); *Midcal*, 445 U.S. at 110 (acknowledging that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" within the state); *Capital Cities Cable, Inc.*, 467 U.S. at 713 (noting that "the core § 2 power" concerns the regulation of alcohol within the state's borders); [*Department of Revenue v.*] *James B. Beam Distilling Co.*, 377 U.S. [341, 344 (1964)] ("[B]y virtue of [section 2 of the Twenty-first

Sixth Circuit, which concluded that Michigan's reliance on this Court's decisions in cases such as *Young's Market* and *Ziffrin* was "disingenuous at best." *Heald*, 342 F.3d at 522.

Moreover, as the Second Circuit explained, the Fourth, Fifth, Sixth, and Eleventh Circuits apparently adopted their two-step analysis based on a misinterpretation of this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Pet. App. 22a n.10 (citing *Heald*, 342 F.3d at 523-24; *Dickerson*, 336 F.3d at 400; *Beskind*, 325 F.3d at 514; *Bainbridge*, 311 F.3d at 1108). Striking down a Hawaii law that granted special tax exemptions for locally produced pineapple wine, this Court made clear in *Bacchus* that the test for application of the dormant Commerce Clause to state statutes involving alcoholic beverages rests on "'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Bacchus*, 468 U.S. at 275-76 (quoting *Capital Cities Cable, Inc.*, 467 U.S. at 714). A threshold question under this test is what are those "reserved" "powers." The answer is found in the plain language of the Twenty-first Amendment: It reserves to the States the power to regulate the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors." U.S. Const. amend. XXI, § 2.

Thus, in *Bacchus*, the tax exemption for Hawaiian pineapple wine was struck on dormant Commerce Clause grounds because it was *not at all* related to the State's "reserved" "power" to regulate the "transportation or importa-

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Amendment] a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.") (internal quotation marks omitted); *Idlewild*, 377 U.S. at 330 (same).").

tion" of alcohol in the State. Furthermore, Hawaii did not even seek to justify its tax on temperance or any other ground protected by the Twenty-first Amendment "but instead acknowledge[d] that the purpose was 'to promote a local industry.'" *Id.* at 276 (citation omitted).[19] In contrast, New York's statute challenged here promotes such legitimate state interests as temperance, tax collection, and orderly market conditions and, thus, falls squarely within the State's "reserved" "power" to regulate the "transportation or importation" of alcoholic beverages "for delivery or use" in the State.

Indeed, more recently, in *North Dakota v. United States*, 495 U.S. 423 (1990), this Court upheld the constitutionality of state "three-tier" systems because state laws prohibiting alcohol shipments from out-of-state producers to anyone other than in-state licensed wholesalers "fall within the core of the State's power under the Twenty-first Amendment" to regulate the "transportation or importation" of alcoholic beverages within the State's borders. *Id.* at 431 n.4, 432. The Court expressly ruled that any state exercise within that "core" power is "unquestionably legitimate." *Id.* at 432. It explained:

> [T]he State has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system. The Court has made clear that the States have the power to control ship-

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[19] Even with that concession on Hawaii's part, three Members of this Court believed that Hawaii's statute was within the State's rights under the Twenty-first Amendment. *Bacchus*, 468 U.S. at 279 (Stevens, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.) (stating that appellants' "Commerce Clause claim is squarely foreclosed by the Twenty-first Amendment to the United States Constitution").

> ments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated in-trastate markets.

Id. at 431 (quoting *Midcal*, 445 U.S. at 110) (citations omitted). That is because a State's "legitimate" interests protected under the Twenty-first Amendment include "promoting temperance, ensuring orderly market conditions, and raising revenue." *Id.* at 432. As Justice Scalia succinctly put it, the Twenty-first Amendment "empowers" each State "to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Id.* at 447 (Scalia, J., concurring).[20]

III. The Issues Raised By The Petition Are Of Nationwide Importance

The issues raised by the petitions in this case are closely related to the issues raised in the petitions in *Heald*, Nos. 03-1116, 03-1120. These petitions raise issues of nationwide importance, and lower courts, state liquor authorities, and alcoholic beverage suppliers need clear guidance on these issues. Most States have statutes barring out-of-state suppliers from directly shipping alcohol to in-state consumers. *See Heald*, No. 03-1120, Pet. at 15 & n.7. Moreover, in addition to the six States whose alcohol regulatory systems already have been challenged in circuit

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[20] *North Dakota* was a plurality opinion written by Justice Stevens and joined by Chief Justice Rehnquist and Justices White and O'Connor. Justice Scalia concurred in all respects material to the case, making it clearly the majority view. Moreover, every Member of this Court agreed that a State may require all imports intended for residents of the State to go through licensed in-state wholesalers.

courts, four other States are now facing similar challenges to their laws in federal district court actions in Arizona, New Jersey, Ohio, and Rhode Island. *See id.* at 15 & n.8.[21]

These challenges to state alcoholic beverage regulatory systems raise serious federalism concerns. The Twenty-first Amendment, which was ratified in 1933 to repeal Prohibition, was expressly intended to grant States control over the "transportation or importation" of alcohol "for delivery or use" within their borders. In response to this grant of authority, most States adopted three-tier regulatory systems for distribution of alcoholic beverages. These systems, which have been in place for 70 years, are now in jeopardy because some circuit courts have fundamentally misapplied the law regarding the relationship between the Twenty-first Amendment and the dormant Commerce Clause.

Moreover, although there is some overlap between the issues raised by the petitions in *Heald* and by the petition in this case, this case does raise somewhat different issues and, thus, the Court may benefit from having two well-developed factual records before it, each of the cases having been decided on summary judgment. For example, under New York's ABC Law, out-of-state wineries may obtain licenses that would allow them to ship their wines directly to in-state consumers, so long as they establish a physical presence in New York and comply with its laws. In contrast, the Sixth Circuit found that there was no such license available to out-of-state wineries under Michigan's alcoholic beverage control law. *See Heald*, 342 F.3d at 521.[22] In addition, while the

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[21] On March 11, 2004, the plaintiffs in the Arizona action voluntarily dismissed their case and agreed not to refile it until after this Court's decisions regarding this petition and the *Heald* petitions.

[22] Petitioners in *Heald* contend that Michigan does not prevent out-of-state wineries from obtaining a "winemakers" license

Second Circuit found New York's statutory scheme not to be discriminatory, the Sixth Circuit found Michigan's statute discriminatory on its face. *Compare* Pet. App. 25a, 29a, *with Heald*, 342 F.3d at 525. Accordingly, this Court's consideration of the issues raised by all currently pending petitions may be illuminated by reviewing both the Second and Sixth Circuits' judgments in these cases.

Given the number of issues raised by both judgments, the number of public and private parties in each case, and the differences between New York's and Michigan's statutory schemes, private respondents respectfully request that the Court agree to review both cases and set the two cases for argument in tandem.[23]

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that would allow them to ship directly to in-state consumers, provided they establish a physical presence in the State. *Heald*, No. 03-1116, Pet. at 23; No. 03-1120, Pet. at 5 n.2, 10. The Sixth Circuit found otherwise. *See Heald*, 342 F.3d at 521 ("[R]eading a number of provisions in conjunction with each other . . . [a]t present, there is no procedure [in Michigan] whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents.") (internal quotation marks omitted) (second alteration in original); *see also id.* at 525-27.

[23] Although private respondents do not oppose petitioners' request that this Court also review their Article IV Privileges and Immunities Clause claim, private respondents question whether that issue warrants this Court's review at this time. The courts of appeals, other than the Second Circuit below, have not even addressed, let alone split on, the Privileges and Immunities Clause issue. Pet. 24. Indeed, the district court below did not even address that issue. Pet. App. 66a-67a. Thus, while petitioners contend that the Court should review their Privileges and Immunities Clause claim precisely because it is unique to this case, that uniqueness actually makes it less worthy of review at this time. Moreover, because petitioners' Privileges and Immunities Clause

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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claim closely parallels their dormant Commerce Clause claim – a point that petitioners concede (Pet. 25-26) – the Twenty-first Amendment would trump that claim in any event. Finally, none of the petitioners has standing to raise this claim in the first instance. The New York consumer petitioners lack standing because the Privileges and Immunities Clause does not protect citizens from allegedly discriminatory actions taken by the State of which they are citizens. Pet. App. 30a n.14 (citing *Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982)). The winery petitioners lack standing because, as business entities or sole proprietorships, they are not "citizens" within the meaning of the Privileges and Immunities Clause of Article IV, *see Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868), *overruled in part on other grounds by United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and, even if they were, they are not in-state complaining of unequal treatment within the State, *see Saenz v. Roe*, 526 U.S. 489, 500-01 (1999); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

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(4)

No. 03-1274

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In The
Supreme Court of the United States

JUANITA SWEDENBURG, in her own capacity, JUANITA SWEDENBURG, as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity, DAVID LUCAS, as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK G. FITZGERALD, CORTES DeRUSSY, and ROBIN BROOKS,

Petitioners,

v.

EDWARD D. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; LAWRENCE J. GEDDA, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; JOSEPH ZARRIELLO, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; CHARMER INDUSTRIES, INC.; PREMIER BEVERAGE COMPANY LLC; PEERLESS IMPORTERS, INC.; LOCAL 2D OF THE ALLIED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION; EBER BROTHERS WINE AND LIQUOR CORP.; METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

THE COURT SHOULD REVIEW THE SECOND CIRCUIT'S SUPERFICIAL REJECTION OF THE PRIVILEGES AND IMMUNITIES CLAIM.

Petitioners are delighted that both respondents, the State and liquor distributors, support review of the Commerce Clause holding of the Second Circuit. However, they oppose review of the Second Circuit's cursory rejection of petitioners' Privileges and Immunities claim, arguing that there is no split in authority among the circuits.

Actually, there is. In reaching a result contrary to the holding below in *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), the Fifth Circuit underscored the independent vitality of the Privileges and Immunities Clause. The state liquor administrator argued that the 21st Amendment provides an exemption to the Commerce Clause. Rejecting that contention, the Fifth Circuit found,

> Accepting arguendo the Administrator's premise, there remains a colorable claim that the provisions of the [Texas direct interstate wine shipment prohibitions] are unconstitutional under the Privileges and Immunities Clause. . . . As amici [petitioners here] have pointed out, the Privileges and Immunities Clause compliments the Commerce Clause in preventing "economic Balkanization," by intending "to place the citizens of each State upon the same footing as citizens of other States." [Citations omitted.] Texas's economically discriminatory regulations against out-of-state wineries clearly violate the "substantial equality" in fundamental rights that is secured, under the Constitution, to all citizens of different states. [Citation omitted.] . . . We need not reach this issue to dispose of this case. . . .

> Nevertheless, this shows how the Administrator's position is constitutionally infirm even if we agreed with his defense [under the Commerce Clause].

Id. at 403 n.67.

As we have argued, the Privileges and Immunities issue is important because the 21st Amendment limits the Commerce Clause but not the Privileges or Immunities Clause. It makes no sense, from the standpoint of judicial economy or justice, to review the first claim but not the second. Were the Court to rule against petitioners on the first claim, the second would remain, protracting litigation and delaying justice. Moreover, it would be illogical to interpret the first constitutional provision in a way that would permit state action that is impermissible under the second. The courts that have failed to consider the latter claim have done so only because they concluded that the state's action is unconstitutional under the Commerce Clause (or the Privileges and Immunities claim wasn't raised). Much as petitioners would welcome such a result in this case, the Court should have before it all relevant constitutional issues. Given that both claims were presented here on cross-motions for summary judgment, this case presents the Court with an opportunity to resolve all constitutional issues, and thus render a definitive decision on the constitutionality of discriminatory and protectionist barriers to direct interstate shipping of wine.

CONCLUSION

Petitioners respectfully urge the Court to accept for review both questions presented in the petition.

Respectfully submitted,

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Nos. 03-1116, 03-1120 & 03-1274

MOTION FILED
JUN 10 2004

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER M. GRANHOLM, et al.,
Petitioners,

v.

ELEANOR HEALD, et al.,
Respondents.

CHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, et al.,
Respondents.

JUANITA SWEDENBURG, et al.,
Petitioners,

v.

EDWARD D. KELLY, et al.,
Respondents.

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n Writs of Certiorari to the United States
Courts of Appeals for the Second and Sixth Circuits

MOTION TO REALIGN PARTIES FOR PURPOSES OF BRIEFING, TO SET BRIEFING SCHEDULE FOR PARTIES AND AMICI, AND FOR EXTENSION OF TIME TO FILE BRIEFS

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The States of Michigan and New York (petitioner in No. 03-1116 and respondent in No. 03-1274, respectively), together with petitioner in No. 03-1120 and all private respondents in No. 03-

1274, respectfully move this Court for an order realigning the parties in these consolidated cases (for purposes of briefing), setting a briefing schedule for parties and amici, and extending the time within which to file the parties' and amici's merits briefs.

1. On May 24, 2004, this Court granted three certiorari petitions arising from two different decisions from two courts of appeals: Granholm v. Heald (No. 03-1116; arising from the Sixth Circuit), MI Beer & Wine Wholesalers v. Heald (No. 03-1120; arising from the Sixth Circuit), and Swedenburg v. Kelly (No. 03-1274; arising from the Second Circuit). This Court consolidated the cases and limited review to the following question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

2. Because the Second and Sixth Circuits respectively upheld and struck down New York's and Michigan's regulatory schemes, the public and private parties who seek to answer the question framed by this Court's order granting certiorari in the affirmative (hereinafter the statutes' "Challengers"), and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners if they are in

the Second Circuit case and as respondents if they are in the Sixth Circuit case. Conversely, the public and private parties who would answer this Court's question in the negative (hereinafter the statutes' "Supporters") and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners in the Sixth Circuit case and as respondents in the Second Circuit case.

3. Although the Michigan and New York statutes are different in respects that would make consolidated briefing infeasible, Movants believe that the Court will nonetheless benefit from coordination of arguments between parties and amici on each side of the question the Court has framed. Such coordination would be quite difficult if the Court were not to adopt a consolidated briefing schedule that realigns the parties to create conformity of posture and interests. Without such relief, parties who would be making substantively similar arguments would file their merits briefs at markedly different times, some as petitioners and some as respondents. In addition, amici on both sides of the question the Court has framed may choose to file with the respondents (in whichever case they agree with the respondents), which would disserve the Court by making it harder for Challengers and Supporters to address amici's arguments in an orderly fashion.

4. Movants submit that the question formulated by this Court's order granting certiorari suggests that those who assert the invalidity of Michigan's and New York's statutory schemes—*i.e.*, that those statutes "violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment"—should be required to set forth the bases for their challenge first. Movants therefore submit that Challengers and their amici should be realigned as petitioners for purposes of briefing these consolidated cases. Since that realignment, without more, would deprive (current) petitioners in Nos. 03-1116 and 03-1120 of the right to submit a reply brief—granting that right instead to (current) respondents in those cases—the Court should permit *both* Challengers and Supporters to submit reply briefs.

5. Movants also believe that a 21-day extension of the time within which to file the principal opening briefs for both Challengers and Supporters (and for amici supporting each party) will help the parties and amici better coordinate their efforts and will not prejudice the Court's timely consideration of these cases during October Term 2004.

6. In light of the foregoing, Movants respectfully request that this Court issue a scheduling order in these consolidated cases that directs Challengers (Swedenburg et al., petitioners in No. 03-1274, and Heald et al., respondents in No. 03-1116 and No. 03-1120) and Supporters (respondents in No. 03-1274 and

petitioners in No. 03-1116 and No. 03-1120) and their respective amici to file briefs on the merits, as well as reply briefs, in the following order:

(a) Opening Briefs for Challengers and their respective amici to be filed on or before July 29, 2004.

(b) Opening Briefs for Supporters and their respective amici to be filed on or before September 23, 2004.

(c) Challengers' Reply Briefs to be filed on or before October 28, 2004.

(d) Supporters' Reply Briefs to be filed on or before November 22, 2004.

7. Counsel for private respondents in No. 03-1274 contacted counsel for each Supporter and Challenger to ascertain their respective positions with respect to the relief sought by this motion. All parties in these cases support this motion, with two exceptions. First, Kenneth W. Starr, Esq., one of the counsel for respondents in Nos. 03-1116 and 03-1120, advised us that his clients oppose any realignment of parties and all other relief sought by Movants, with the exception of extensions of time to file the parties' principal briefs. Second, Clint Bolick, Esq., Counsel of Record for petitioners in No. 03-1274 advised us that he objects to the relief sought by Movants only

insofar as any order realigning parties would also permit Supporters to file a reply brief.

Respectfully submitted,

Miguel A. Estrada, by permission, on behalf of all movants.

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In The Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Certiorari Granted: May 24, 2004

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Exhibit 28 to Declaration of Clint Bolick, executed on October 11, 2001, in support of Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, dated October 17, 2001 – Supplemental Affidavit of John Dyson, sworn to on September 21, 2001 204

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The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Appendix to the Petition for Writ of Certiorari at the following pages:

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Decision and Order of the United States District Court for the Southern District of New York, Filed November 12, 2002..... 34a

Judgment of the United States District Court for the Southern District of New York, Dated December 10, 2002..... 72a

RELEVANT DOCKET ENTRIES

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:00-cv-00778-RMB-HBP

Filing Date	#	Docket Text
02/03/2000	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $150.00 RECEIPT #365606. (bm) (Entered: 02/07/2000)
		* * *
09/05/2000	26	Decision and ORDER; denying [15-1] motion to dismiss the complaint purs to FRCP 12(b)(6) for failure to state a claim; Counsel are directed forthwith to contact Court Deputy Christine Murray at (212) 805-6715 to arrange a scheduling conference with the Court; (signed by Judge Richard M. Berman); Copies mailed. (djc) (Entered: 09/06/2000)
09/06/2000	27	Transcript of record of proceedings before Judge Richard M. Berman for the date(s) of 7/21/00. (lam) (Entered: 09/06/2000)
		* * *
10/10/2000	34	AMENDED ANSWER to Complaint by Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello: amends [32-1] answer (cd) (Entered: 10/11/2000)
10/19/2000	36	ANSWER to Complaint by Intervenor-Defts (sac) (Entered: 10/24/2000)
		* * *

06/07/2001	58	NOTICE OF MOTION (FILED ON SERVICE DATE) by plaintiffs, for an order granting summary judgment. Return date 10/17/01. (kw) Modified on 06/12/2001 (Entered: 06/12/2001)
06/11/2001	59	MEMORANDUM OF LAW by plaintiffs in support of [58-1] motion for an order granting summary judgment. (kw) Modified on 06/12/2001 (Entered: 06/12/2001)
06/11/2001	60	RULE 56.1 STATEMENT filed by plaintiffs. (kw) (Entered: 06/12/2001)

* * *

08/17/2001	65	NOTICE OF CROSS MOTION (FILED ON SERVICE DATE) by Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello and Intervenor-defendants, for an order granting summary judgment. Affidavits of Cook, Hellerstein, Kitt, Wechsler, Butts III, McKeon, Cummings, McDevitt and Meresman are attached. Return date is 10/17/01. (Received in the night deposit box on 8/17/01). (kw) Modified on 08/22/2001 (Entered: 08/22/2001)
08/17/2001	66	DECLARATION of Frederick P. Schaffer by defendant in support of Re: [65-1] cross motion for an order granting summary judgment, and in opposition to [58-1] motion for order granting summary judgment. (Received in the night deposit box on 8/17/01). (kw) (entered: 08/22/2001)

08/17/2001	67	DECLARATION of Randy M. Mastro by defendants in support of Re: [65-1] cross motion for an order granting summary judgment, and in opposition to [58-1] motion for an order granting summary judgment. (Received in the night deposit box on 8/17/01). (kw) (entered: 08/22/2001)
08/17/2001	68	MEMORANDUM OF LAW by defendants in support of re: [65-1] cross motion for an order granting summary judgment, and in opposition to [57-1] motion for an Order pursuant to Rule 1.3(c) of the Local Rules of this Court admitting Marni Soupcoff to the bar of this Court pro hav [sic] vice on behalf of plaintiffs. (Received in the night deposit box on 8/17/01). (kw) (Entered 08/22/2001)
08/17/2001	69	RULE 56.1 STATEMENT and Counter-statement of Material facts pursuant to Rule 56.1(b) filed by defendants and intervenor-defendants. (Received in the night deposit box on 8/17/01). (kw) (Entered: 08/22/2001)

* * *

10/17/2001	73	REPLY MEMORANDUM by Juanita Swedenburg, Juanita Swedenburg, David Lucas, David Lucas, Patrick Fitzgerald, Cortes DeRussy, Robin Brooks of [58-1] motion for an order granting summary judgment. (jco) (Entered: 10/19/2001)
10/17/2001	74	DECLARATION of Clint Bolick by Juanita Swedenburg, Juanita Swedenburg, David Lucas, David Lucas, Patrick Fitzgerald, Cortes DeRussy, Robin Brooks

in support of [73-1] reply memorandum. (jco) (Entered: 10/19/2001)

10/17/2001 75 RULE 56.1 STATEMENT filed by Juanita Swedenburg, Juanita Swedenburg, David Lucas, David Lucas, Patrick Fitzgerald, Cortes DeRussy, Robin Brooks. (jco) (Entered: 10/19/2001)

10/17/2001 76 DECLARATION of Clint Bolick by Juanita Swedenburg, Juanita Swedenburg, David Lucas, David Lucas, Patrick Fitzgerald, Cortes DeRussy, Robin Brooks in support of [73-1] reply memorandum. (jco) (Entered: 10/19/2001)

* * *

11/13/2001 81 REPLY MEMORANDUM by Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello, and intervenor-defendants re: in support [65-1] cross motion for an order granting summary judgment, and in opposition to plaintiffs' motion for summary judgment, and reply memorandum of the State University of New York, The City University of New York, Fordham University, and St. Francis College as Amici Curiae in support of defendants and intervento [sic]-defendants' cross-motion for summary judgment. (bai) (Entered: 11/14/2001)

11/13/2001 82 REPLY DECLARATION of Randy M. Mastro by Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello Re: in support of defendants and intevenor-defendants' [65-1] cross motion for an order granting summary judgment, and in opposition to plaintiffs' motion for

summary judgment. exhibits attached. (bai) Modified on 11/14/2001 (Entered: 11/14/2001)

* * *

06/07/2002 84 Transcript of record of proceedings before Judge Richard M. Berman for the date(s) of 4/17/02 at 9:00 a.m. (ph) (Entered: 06/11/2002)

* * *

11/12/2001 86 DECISION AND ORDER; that for the reasons set forth in this Order, plaintiffs' [58-1] motion for summary judgment is granted and defendants' [65-1] motion for summary judgment is denied; the Court would like to have additional input from the parties before deciding the issue of remedy, and will hold a conference for this purpose on 12/5/02 at 11:00 a.m. in Courtroom 706 of the Thurgood Marshall Courthouse, 40 Centre Street; the parties are requested forthwith to "meet and confer" to determine whether consensus can be reached with respect to remedy; additional briefing, which may become useful, is not called for at this time. (signed by Judge Richard M. Berman); document forwarded to Judgment Clerk. (kkc) (Entered: 11/14/2002)

11/15/2002 87 JUDGMENT; that for the reasons stated in the Court's Decision and Order dated 11/12/02, plaintiffs' motion for summary judgment is granted, and defendant's motion for summary judgment is denied. (signed by J. Michael McMahon, Acting

Clerk of Court); Mailed copies and notice of right to appeal. Entered On Docket: 11/19/02. Judgment Vacated as per Chambers direction. Case is still pending (11/22/02). (pl) Modified on 11/22/2002 (Entered: 11/19/2002)

* * *

12/10/2002 93 Letter field by Juanita Swedenburg, Juanita Swedenburg, David Lucas, David Lucas, Patrick Fitzgerald, Cortes DeRussy, Robin Brooks addressed to Judge Richard M. Berman from Clint Bolick, dated 12/2/02, re: Enclosed is Plaintiffs' proposed final judgment. (dle) Modified on 12/31/2002 (Entered: 12/16/2002)

12/10/2002 94 Letter filed addressed to Judge Richard M. Berman from Howard Graff, dated 12/3/02, re: Intervenor-Defendants submits this letter expresly [sic] preserving their objections to this Court's 11/12/02 Decision and Order, and w/out waiver of any of the grounds for appealing the Decision, submit herewith a proposed Final Judgment providing that, as a remedy for the discrimination perceived by this Court in the exemption of N.Y. farm wineries from the overall prohibition on direct shipments of alcoholic beverages to consummers [sic], the "farm winery exemption" contained in N.Y. Alco. Bev. Cont. Law shall be severed and invalidated; accompanied by Supplemental Affidavit of Howard P. Kitt, sworn to on 12/2/02. (dle) Modified on 01/06/2003 (Entered: 12/16/2002)

* * *

12/11/2002	91	JUDGMENT; that for the reasons stated in the Court's Decision and Order dated 11/12/02, plaintiffs' motion for summary judgment is granted, that defendants' motion for summary judgment is denied; defendants are enjoined from enforcing N.Y. Alco. and Bev. Cont. Law sections 102(1)(c) and (d) 102(a) in the manner that is set forth in this Judgment; enforcement of this judgment (and its injunctions are stayed pending any appeal to the U.S. Court of Appeals for the Second Circuit or, if no appeal is taken until expiration of the time for taking such appeal. (signed by Judge Richard M. Berman); Mailed copies and notice of right to appeal. Entered On Docket: 12/12/02. (pl) (Entered: 12/12/2002)

* * *

12/29/2002	100	NOTICE OF APPEAL by Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello from [91-1] judgment order. Copies of notice of appeal mailed to Attorney(s) of Record: Clint Bolick, Esq., Howard Graff, Esq., Steve Simpson, Esq., Robert M. Heller, Esq., Randy M. Mastro, Esq., Joseph Fleming, Esq., Michael Kalmus, Esq., John O'Mara, Esq. and Alan J. Gardner, Esq. $105.00 Appeal filing fee paid 12/29/02 on receipt # E 0460428. (dt) (Entered: 12/31/2002)
01/08/2003	101	NOTICE OF APPEAL by Charmer Industries, Inc., Peerless Importers Inc., Eber Brothers Wine & Liquor Corp., Premier Beverage Co., LLC.,

Metropolitan Package Store Association, Inc., and Local 2D of the Allied Food and Commercial Workers International Union, (Intervenors-Defendants.) from [45-1] motion for an order to compel the State defendants, Edward F. Kelly, Lawrence J. Gedda, and Joseph Zarriello, to respond to plaintiffs' Request for Admissions, [42-1] motion clarifying the matters at issue in this case. Copies of notice of appeal mailed to Attorney(s) of Record: August L. Fietkau, Clint Bolick, Stephen Simpson, Lance J. Gotko. $105.00 APPEAL FILING FEE PAID ON 1/10/03, ON RECEIPT # E 046132. (pr) (Entered: 01/13/2003)

* * *

United States Court of Appeals
for the Second Circuit

5/16/03 Intervenor-Appellants Charmer Industries, Peerless Importers, Local 2D, Metropolitan Package brief FILED with proof of service.

5/16/03 Appellant Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello, Eber Brothers Wine, Premier Beverage Co brief FILED with proof of service.

5/16/03 Appellants Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello, Charmer Industries, Peerless Importers, Local 2D of the Alli, Metropolitan Package, Eber Brothers Wine, Premier Beverage Co joint appendix filed w/pfs. Number of volumes: 6.

* * *

6/16/03 Appellees Juanita Swedenburg, Juanita Swedenburg, David Lucas, David Lucas, Patrick G. Fitzgerald, Cortes Derussy, Robin Brooks brief filed with proof of service.

* * *

6/30/03 Intervenor-appellants Charmer Industries, Peerless Importers, Local 2D of the Alli, Appellant Metropolitan Package in 02-9511 reply brief filed with proof of service.

* * *

7/2/03 Appellant Edward F. Kelly, Lawrence J. Gedda, Joseph Zarriello reply brief filed with proof of service.

* * *

9/3/03	Case heard before NEWMAN, SOTOMAYOR, WESLEY, C.JJ. (TAPE: CD Date: 9/3/03)
	* * *
2/12/04	Judgment of the district court is Affirmed in part, Reversed and Remanded in part by published signed opinion filed. (RCW) [02-1266]
2/12/04	Judgment filed.
	* * *

NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW

§ 2. Policy of state and purpose of chapter

It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law. It is hereby declared that such policy will best be carried out by empowering the liquor authority of the state to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby, subject only to the right of judicial review hereinafter provided for. It is the purpose of this chapter to carry out that policy in the public interest. The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state.

§ 3. Definitions

Whenever used in this chapter, unless the context requires otherwise:

37. "Winery" means and includes any place or premises wherein wines are manufactured from any fruit or brandies distilled as the by-product of wine or other fruit or cordials compounded and also includes a winery for the manufacture of wine in any state other than New York state and which has and maintains a branch factory, office or storeroom within the state of New York and receives wine in this state consigned to a United States

government bonded winery, warehouse or storeroom located within the state.

§ 77. Sale of wine in bulk

1. A winery license shall authorize the holder thereof to operate a winery for the manufacture of wine at the premises specifically designated in the license and to receive and possess wine from other states consigned to a United States government bonded winery, warehouse or storeroom located within the state. Such a license shall also authorize the sale in bulk by such licensee from the licensed premises of the products manufactured under such license and wine received by such licensee from any other state to any winery licensee, any distiller licensee or to a permittee engaged in the manufacturer of products which are unfit for beverage use and to sell or deliver such wine to persons outside the state pursuant to the laws of the place of such sale or delivery. It shall also authorize the holders thereof to sell from the licensed premises to a licensed wholesaler or retailer, or to a corporation operating railroad cars or aircraft for consumption on such carriers, wine manufactured or received by the licensee as above set forth in the original sealed containers of not more than fifteen gallons each and to sell or deliver such wine to persons outside the state pursuant to the laws of the place of such sale or delivery. All wine sold by such licensee shall be securely sealed and have attached thereto a label setting forth such information as shall be required by this chapter.

2. Notwithstanding any provision of this chapter to the contrary, and upon payment to the liquor authority of an additional annual fee of one hundred twenty-five dollars,

the liquor authority may in its discretion and upon such terms and conditions as it may prescribe, issue to a licensed winery upon application therefor a certificate authorizing such winery to sell wine at retail in sealed containers to a regularly organized church, synagogue or religious organization for sacramental purposes, and to a householder for consumption in his home.

3. [Repealed]

4. (a) A licensed winery may manufacture, bottle and sell fruit juice, fruit jellies and fruit preserves, tonics and unpotable wine cooking sauces on and from licensed premises, provided that the winery license number does not appear on the labels of such products, and operate a restaurant on the premises.

(b) Such license shall authorize the holder thereof to store and sell gift items in a tax-paid room upon the licensed premises. These gift items shall be limited to the following categories:

(1) Wine supplies, which shall include any item utilized for the storage, serving or consumption of wine. These supplies may be sold as single items or may be combined into a package sold as a unit item or may be combined into a package containing wine or a wine product;

(2) Food items, which shall include any food or food product not specifically prepared for immediate consumption upon the premises. Such food items may be combined into a package containing wine or a wine product;

(3) Souvenirs, which shall include any item which can be construed to represent or serve as a memento of the licensed premises or of the state of New York.

(4) (Added, L 1993) New York state labelled wine produced or manufactured by any other New York state winery or farm winery licensee. Such wine may be purchased outright by the licensee from a New York winery or farm winery licensee or obtained on a consignment basis pursuant to a written agreement between the selling and purchasing licensee.

(c) Notwithstanding any provision of this chapter to the contrary, any winery licensee or farm winery licensee may charge:

(1) For tours of their premises; and

(2) For any wine tastings.

(d) Wine grape growers or wine producer organizations or associations, incorporated within the state for the purpose of wine or wine grape promotion may hold wine tastings for purposes of education in the production and proper use of wine products under the same rules applying to winery licensees.

(e) The authority is hereby authorized to promulgate rules and regulations to effectuate the purposes of this subdivision.

(f) A licensed winery may engage in any other business on the licensed premises subject to such rules and regulations as the liquor authority may prescribe. In prescribing such rules and regulations, the liquor authority shall promote the expansion and profitability of wine production and of tourism in New York, thereby promoting the conservation, production and enhancement of New York state agricultural lands. Further, such rules and regulations [fig 1] shall determine which businesses will be compatible with the policy and purposes of this chapter

and shall consider the effect of particular businesses on the community and area in the vicinity of the winery licensee.

5. A licensed winery shall be permitted to remain open for the purposes of selling its products, in accordance with the provisions of subdivisions two and three of this section, and/or of conducting public tours of its winery and/or to sell New York state labelled wine, by the bottle, at the state fair, at recognized county fairs and at farmers markets operated on a not-for-profit basis in accordance with the provisions of section seventy-six of this article on Sunday between the hours of ten o'clock in the morning and midnight.

The authority is hereby authorized to promulgate rules and regulations to effectuate the purposes of this subdivision.

§ 100. Alcoholic beverages generally

1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

2. No manufacturer and no wholesaler shall sell, or agree to sell or deliver in this state any alcoholic beverage for the purposes of resale to any person who is not duly licensed pursuant to this chapter to sell such beverages, at wholesale or retail, as the case may be, at the time of such agreement and sale.

§ 161. Invalidity; effect of

If any part, provision or section of this chapter or the application thereof to any person or circumstances shall be held invalid by any court of competent jurisdiction, the remainder thereof or the application of such part, provision or section to any other person or circumstances shall not be affected thereby.

LAWS OF NEW YORK, 1934

CHAPTER 478

AN ACT relating to alcoholic beverages, constituting chapter three-b of the consolidated laws

Became a law May 10, 1934, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER 3-B OF THE CONSOLIDATED LAWS

ALCOHOLIC BEVERAGE CONTROL LAW

Article 1. Short title; policy of state and purpose of chapter; definitions. (§§ 1-3.)
2. Liquor authority. (§§ 10-18.)
3. Local alcoholic beverage control boards. (§§ 30-43.)
4. Special provisions relating to beer. (§§ 50-57.)
5. Special provisions relating to liquor. (§§ 60-67.)
6. Special provisions relating to wine. (§§ 75-84.)
7. Special permits. (§§ 90-99.)
8. General provisions. (§§ 100-130.)
9. Local option. (§§ 140-147.)
10. Miscellaneous provisions; laws repealed; time of taking effect. (§§ 150-153.)

* * *

§ 102. **General prohibitions and restrictions.** 1. (a) No person shall send or cause to be sent into the state any letter, postcard, circular, newspaper, pamphlet or publication of any kind containing an advertisement or a solicitation of any order for any liquors and/or wines,

unless such person shall be duly licensed hereunder to traffic in liquors and/or wines, as the case may be.

(b) No person shall issue or publish or cause to be issued or published in the state any letter, postcard, circular, newspaper, pamphlet or publication of any kind containing an advertisement or a solicitation of any order for any liquors and/or wines, unless such person shall be duly licensed hereunder to traffic in liquors and/or wines, as the case may be.

(c) No liquors and/or wines shall be shipped into the sate, unless the same shall be consigned to a person duly licensed hereunder to traffic in liquors and/or wines, as the case may be.

(d) No common carrier or other person shall bring or carry into the state any liquors and/or wines, unless the same shall be consigned to a person duly licensed hereunder to traffic in liquors and/or wines, as the case may be.

(e) Subdivisions (c) and (d) hereof shall apply to liquors and/or wines, either in the original package or otherwise, whether intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage.

2. No person holding any license hereunder shall knowingly employ in connection with his business in any capacity whatsoever, any person who has been convicted of a felony, or any of the following misdemeanors, or offenses, to wit:

(a) Illegally using, carrying or possessing a pistol or other dangerous weapon;

(b) Making or possessing burglar's instruments;

(c) Buying or receiving stolen property;

(d) Unlawful entry of a building;

(e) Aiding escape from prison;

(f) Unlawfully possessing or distributing habit forming narcotic drugs;

(g) Violating subdivisions six, eight, ten or eleven of section seven hundred twenty-two of the penal law; or

(h) Vagrancy.

3. No licensee shall purchase or agree to purchase any liquors and/or wines from any person within the state who is not duly licensed to sell liquors and/or wines as the case may be, at the time of such agreement and sale nor give any order for liquors and/or wines to any individual who is not the holder of a solicitor's permit.

4. No licensee or any of his or its agents, servants or employees shall peddle any liquor and/or wine from house to house by means of a truck or otherwise, where the sale is consummated and delivery made concurrently at the residence or place of business of a consumer. This subdivision shall not prohibit the delivery by a licensee to consumers, pursuant to sale made at the place of business of said licensee.

5. No licensee shall employ any canvasser or solicitor for the purpose of receiving an order from a consumer for any liquor and/or wine at the residence or place of business of such consumer, nor shall any licensee receive or accept any order, for the sale of any liquor and/or wine, which shall be solicited at the residence or place of

business of a consumer. This subdivision shall not prohibit the solicitation by a wholesaler of an order from any licensee at the licensed premises of such licensee.

6. No liquor and/or wine shall be released for delivery from any warehouse located within the state, except upon a permit having first been obtained as provided by this chapter. Applications for such permits may be filed at the office of the liquor authority in New York, Albany or Buffalo, whichever is nearest to the location of the warehouse, and shall be upon a form to be prepared by the liquor authority. This provision shall not apply to liquor and/or wine, which is to be released for shipment outside of the state.

7. Each person owning or operating any warehouse located within the state shall keep and maintain as part of his permanent records, treasury department forms fifty-two and fifty-two-a as heretofore required by the United States government.

* * *

27 U.S.C.A. § 122

United States Code Annotated
Title 27. Intoxicating Liquors
Chapter 6. Transportation in Interstate Commerce

§ 122. Shipments into States for possession or sale in violation of State law

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.

(Mar. 1, 1913, c. 90, § 1, 37 Stat. 699, Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877.)

HISTORICAL AND STATUTORY NOTES

Codifications

Credit originally appeared without a section designation, as Act Mar. 1, 1913, c. 90, 37 Stat. 699, which originally

consisted of a single undesignated section. The section 1 designation was added due to the addition of further sections 2 and 3 to c. 90 by Pub.L. 106-386, which are classified to sections 122a and 122b of this title, respectively.

Amendments

1935 Amendments. The language of this section was reenacted without change by Act Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877.

Short Title

1913 Acts. The Act of Mar. 1, 1913, c. 90, cited to the text was entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," and is known as the "Webb-Kenyon Act." The Act having been returned by the President with his objections thereto, to the Senate, in which it originated, was passed by a two-thirds vote of that body and sent by it to the House of Representatives which passed the same by a two-thirds vote, whereupon it became a law by virtue of Art. I, § 7, of the Constitution of the United States.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUANITA SWEDENBURG, in her own capacity and as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity and as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK FITZGERALD; CORTES DeRUSSY; and ROBIN BROOKS;	No. ___
Plaintiffs,	
-against-	**COMPLAINT**
EDWARD F. KELLY, Chairman, and LAWRENCE J. GEDDA and JOSEPH ZARRIELLO, Commissioners, of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities,	
Defendants.	

INTRODUCTION

1. This is a civil rights action seeking declaratory and injunctive relief to vindicate economic liberty, consumer freedom, and freedom of speech. Two of the five plaintiffs are small wineries operating outside the State of New York that are prohibited under state law from selling or shipping wines directly to New York that are prohibited under state law from selling or shipping wines directly to New York residents, or from advertising their products

within the State of New York. The other three plaintiffs are New York consumers who would like to purchase wines from the plaintiff producers but are prevented from doing so by New York law. The statutory regime that separates willing producers from willing purchasers is discriminatory and is intended and has the effect of protecting certain economic interests from competition from out-of-state enterprises. It therefore violates the fundamental rights of American citizens to free commerce, privileges and immunities, and freedom of speech.

JURISDICTON AND VENUE

2. This case is brought pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 2201. Subject matter jurisdiction is based on 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

3. Venue is appropriate pursuant to 28 U.S.C. § 1391(b).

FACTUAL ALLEGATIONS

Parties

4. Plaintiff Juanita Swedenburg is a citizen of the United States, a resident of the Commonwealth of Virginia, and proprietor of Swedenburg Winery, a Virginia partnership. Swedenburg Winery has been in business since 1987.

5. Plaintiff David Lucas is a citizen of the United States, a resident of the State of California, and proprietor of The Lucas Winery, a California sole proprietorship. The Lucas Winery has been in business since 1978.

6. Plaintiff Patrick Fitzgerald is a citizen of the United States and resides in Elmira, New York.

7. Plaintiff Cortes DeRussy is a citizen of the United States and a resident of Bronxville, New York.

8. Plaintiff Robin Brooks is a citizen of the United States and a resident of New York, New York.

9. Defendants Edward F. Kelly, Lawrence Gedda, and Joseph Zarriello are commissioners of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York. They are sued in their official capacities. The State Liquor Authority is the agency of the State of New York responsible for issuing all licenses and permits for the manufacture, distribution, and sale of alcoholic beverages and for ensuring compliance with the Alcoholic Beverage Control Law. (*See* N.Y. Alco. Bev. Cont. Law § 10.)

10. At all times alleged herein, defendants and their agents have acted under color of state law.

The Unconstitutional Statutory Scheme

11. N.Y. Alco. Bev. Cont. Law § 102(1)(c) provides, *inter alia*, that "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages. This prohibition shall apply to all shipments of alcoholic beverages into New York state and includes importation or distribution for commercial purposes, for personal use, or otherwise, and irrespective of whether such alcoholic beverages were purchased within or without the state. . . ." The provision makes an exception for certain alcoholic purchases for personal use made outside

the United States and shipped by the purchaser to him or herself.

12. N.Y. Alco. Bev. Cont. Law § 102(1)(d) provides, *inter alia*, that "No common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages. . . ."

13. N.Y. Alco. Bev. Cont. Law § 102(1)(a) states that "No person shall send or cause to be sent into the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind containing an advertisement or a solicitation of any order for any alcoholic beverages, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, unless such person shall be duly licensed hereunder to traffic in alcoholic beverages.

14. N.Y. Alco. Bev. Cont. Law § 102(3-b) forbids retail licensees from purchasing or receiving alcoholic beverages except from duly licensed persons.

15. N.Y. Alco. Bev. Cont. Law § 130(1) provides that the illegal sale of alcohol is a misdemeanor punishable by prescribed fine or imprisonment.

16. N.Y. Alco. Bev. Cont. Law § 130(3) provides that other violations of the Alcoholic Beverage Control Law constitute a misdemeanor.

17. Licensed wineries in New York State are not subject to the restrictions of N.Y. Alco. Bev. Cont. Law §§ 102(a)-(c) (collectively, the "Direct Shipment and Advertising Ban").

18. Plaintiff wineries, although licensed to produce and sell wine in their own states, are not eligible for licensure in the State of New York. They are therefore subject to the Direct Shipment and Advertising Ban.

19. The Direct Shipment and Advertising Ban, combined with N.Y. Alco. Bev. Cont. Law § 102(3-b), create a monopoly by which licensed wholesales have the exclusive authority under state law to import or distribute wines from out-of-state wineries for purchase by New York residents.

The Unjust Impact of the Unconstitutional Direct Shipment and Advertising Ban on Producers and Consumers

20. Plaintiff wineries each produce a small amount of wine each year. Few wineries of such small size are represented by wine wholesalers by reason of economies of scale. Like most small wineries, plaintiff wineries sell the vast majority of their wine to customers who visit their wineries from around the country, and by direct shipment to their customers in their own states and around the country. Absent direct sale and shipment of wines to consumers, the plaintiff wineries would cease to operate as viable business enterprises.

21. The plaintiff wineries are not represented by wholesalers in New York. The operation of the Direct Shipment and Advertising Ban therefore has the effect of preventing plaintiff wineries of the opportunity to sell wines in the State of New York.

22. The State of New York has enforced the Direct Shipment and Advertising Ban through sting operations, fines, and other means.

23. The winery plaintiffs all have New York customers who would like to order their products. The winery plaintiffs would sell and ship products to New York customers but do not do so because of the Direct Shipment and Advertising Ban.

24. Licensed New York wineries may sell their wines directly to New York customers; they may offer tastings to the public; they may ship wine directly to New York customers; and they may ship wine to customers from other licensed New York wineries.

25. The winery plaintiffs would like to send brochures, wine lists, order forms, or other advertisements to New York customers but do not do so because of the Direct Shipment and Advertising Ban.

26. Plaintiff David Lucas maintains a nationwide mailing list of customers, including New York customers. He also maintains an internet Website where he posts information about his winery and his wines. Through this mailing list, the Internet, and other means, plaintiff Lucas has advertised and otherwise provided information about his wines to residents of New York. He cannot lawfully send advertisements to New York customers because of the Direct Shipment and Advertising Ban.

27. Plaintiff Juanita Swedenburg includes a brochure, wine list, order form or other advertisement for her wines in packages of wine that she ships to customers. She has past and possible future customers in New York and would like to send those customers her brochure, wine

lists, order form, or other advertisement, but she cannot because of the Direct Shipment and Advertising Ban.

28. Licensed New York wineries may send brochures, wine lists, order forms, and other advertisements directly to New York customers.

29. The consumer plaintiffs are wine enthusiasts who desire to purchase wine directly from out-of-state wineries and/or through Internet retailers. One or more of them have purchased wine via the Internet or direct mail.

30. Because the Direct Shipment and Advertising Ban prohibits common carriers from delivering wine shipments directly to consumers from non-licensed producers or retailers, New York residents including the consumer plaintiffs cannot visit out-of-state wineries, including plaintiff wineries, and ship the wines back to themselves.

31. In January 2000, the consumer plaintiffs each ordered wines from the one or more of the plaintiff wineries, supplying a copy of their drivers' licenses to demonstrate that they are legal adults, providing credit card information, and requesting direct delivery of the wines. Although the plaintiff wineries were prepared to sell the wine to the consumer plaintiffs, in each instance the orders were denied on the sole ground that the sale and shipment would violate the Direct Shipment and Advertising Ban. The orders and responses are attached as Exhibit A to this Complaint.

FIRST CAUSE OF ACTION
(VIOLATION OF INTERSTATE COMMERCE CLAUSE)

32. The allegations contained in paragraphs 1-31 are incorporated by reference as if fully set forth herein.

33. The interstate commerce clause, U.S. Const. art. 1, sec. 8, cl. 3, creates open national markets and prohibits discriminatory trade legislation among the states.

34. The Direct Shipment and Advertising Ban discriminates on its face against out-of-state wineries, and in favor of New York wineries, by prohibiting direct sales and shipments of wines to New York consumers from out-of-state wineries and by permitting such direct sales and shipments to New York consumers by licensed in-state wineries.

35. Defendants have no adequate justification for maintaining such discrimination.

36. A principal purpose of the Direct Shipment and Advertising Ban is economic protectionism, primarily or exclusively for the benefit of wholesalers. That purpose is not a valid justification for discriminatory trade barriers under the interstate commerce clause.

37. The discriminatory Direct Shipment and Advertising Ban prevents the plaintiff wineries from selling and shipping wines directly to New York consumers, including the consumer plaintiffs; and prevents the consumer plaintiffs from obtaining desired wines from out-of-state producers, including plaintiff wineries.

38. Accordingly, the Direct Shipment and Advertising Ban violates the rights of all the plaintiffs to freedom

of commerce as guaranteed by the interstate commerce clause.

SECOND CAUSE OF ACTION (VIOLATION OF PRIVILEGES AND IMMUNITIES CLAUSE)

39. The allegations contained in paragraphs 1-38 are incorporated by reference as if fully set forth herein.

40. The privileges and immunities clause embodied in U.S. Const. art. 4, sec. 2, cl. 1 states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."

41. The freedom to pursue a livelihood is a fundamental right protected by the privileges and immunities guarantee.

42. The Direct Shipment and Advertising Ban prevents plaintiffs Swedenburg and Lucas from directly selling and shipping wines to New York consumers. Absent the prohibition, the winery plaintiffs would sell and ship wines to New York consumers.

43. Because nearly all the winery plaintiffs' sales are directly to consumers, the Direct Shipment and Advertising Ban significantly impairs plaintiffs' ability to pursue their chosen and legitimate livelihood.

44. The opportunities available to plaintiffs Swedenburg and Lucas to sell and ship wine directly to New York consumers are severely disadvantageous relative to the opportunities available to similarly situated New York wineries, by virtue of the Direct Shipment and Advertising Ban.

45. No adequate justification exists to deny plaintiffs Swedenburg and Lucas the opportunities to directly ship and sell wine to New York consumers that are available to New York wineries.

46. Accordingly, the Direct Shipment and Advertising Ban violates the economic liberty of plaintiffs Swedenburg and Lucas under the privileges and immunities guarantee.

THIRD CAUSE OF ACTION
(VIOLATION OF FIRST AMENDMENT)

47. The allegations contained in paragraphs 1-46 are incorporated by reference as if fully set forth herein.

48. The First Amendment to the United States Constitution, applied to the states through the 14th Amendment, prohibits the states from making any law abridging freedom of speech.

49. The Direct Shipment and Advertising Ban, on its face, prohibits in the most sweeping terms truthful information and advertising about wine, including but not limited to commercial speech.

50. The Direct Shipment and Advertising Ban subjects to misdemeanor liability any person who advertises out-of-state wines in any manner whatsoever, including over the Internet. By its terms, the Direct Shipment and Advertising Ban even forbids speech inviting New York residents to visit out-of-state wineries where they may lawfully taste and purchase the products.

51. Plaintiff Lucas has advertised and otherwise provided information about their wines to residents of

New York through mailings, the Internet, and other means. Plaintiffs Lucas and Swedenburg desire to and would advertise and otherwise provide information about their wines to residents of New York through mailings, the Internet, and other means.

52. Consumer plaintiffs Fitzgerald, DeRussy, and Brooks have secured information, and desire to secure further information, including ordering information, about wines from out-of-state wineries and over the Internet.

53. The Direct Shipment and Advertising Ban exerts a chilling effect on protected speech, and on its face forbids certain protected speech. No adequate justification exits for this censorship of speech.

54. Accordingly, the Direct Shipment and Advertising Ban violates the right of the winery plaintiffs to produce, and of the consumer plaintiffs to receive, protected speech in violation of the First Amendment.

REQUEST FOR RELIEF

For the foregoing constitutional violations, the plaintiffs respectfully request that this honorable Court:

A. Declare that N.Y. Alco. and Bev. Cont. Law §§ 102(1)(a), (c), and (d) are unconstitutional, void, and of no effect;

B. Preliminarily and permanently enjoin defendants from enforcing N.Y. Alco. and Bev. Cont. Law §§ 102(1)(a), (c), and (d);

C. Award reasonable attorney fees pursuant to 42 U.S.C. § 1988; and

D. Order such further relief as to the Court seems just and proper.

Dated: New York, New York
February 3, 2000

Clint Bolick
William H. Mellor III
Deborah Simpson (DS-4558)
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– and –

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JUANITA SWEDENBURG, in her own capacity and as proprietor of SWEDENBURG WINERY, a Virginia partnership; DAVID LUCAS, in his own capacity and as proprietor of THE LUCAS WINERY, a California sole proprietorship; PATRICK FITZGERALD; CORTES DeRUSSY; and ROBIN BROOKS;

Plaintiffs,

-against-

EDWARD F. KELLY, Chairman, LAWRENCE J. GEDDA and JOSEPH ZARRIELLO, Commissioners, of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities,

Defendants,

and

CHARMER INDUSTRIES, INC., PEERLESS IMPORTERS, INC., EBER BROTHERS WINE & LIQUOR CORP., PREMIER BEVERAGE COMPANY LLC, METROPOLITAN PACKAGE STORE ASSOCIATION, INC., LOCAL 2D OF THE ALLIED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, and DR. CALVIN BUTTS,

Intervenor-Defendants.

Case No.
00 CV 778 (RMB)

Exhibit A to Plaintiffs' Notice of Motion for Summary Judgment, dated June 7, 2001 – Affidavit of Juanita Swedenburg, sworn to on May 22, 2001

AFFIDAVIT OF JUANITA SWEDENBURG

CITY OF MIDDLEBURG)
) SS.
STATE OF VIRGINIA)

Juanita Swedenburg, being first duly sworn, upon oath, states as follows:

1. I am a citizen of the United States, a resident of the State of Virginia, and over 18 years of age. I am a plaintiff in this action. I make this affidavit based on my personal knowledge of the facts set forth and am competent to testify thereto if called as a witness at trial.

2. I am a proprietor of Swedenburg Winery, a Virginia partnership. Swedenburg holds an Virginia ABC license and a BATF license to produce and sell wine.

3. Swedenburg Winery opened to the public in the spring of 1988, but there was a great deal of work and preparation that took place before the formal opening. Beginning around 1986, I started studying and attending classes on winemaking and related lab work. I attended seminars at Cornell University, Pennsylvania State University, and Ohio State University on different aspects of winemaking, studying red wine production, aromas, enzymes, blending, Rieslings, and Chardonnays, among other subjects. I continue to attend similar seminars and roundtables to this day.

4. Before beginning construction of Swedenburg Winery in 1987, we spent time securing a loan, getting plans

made, finding a builder, and going through the examination processes for receiving federal and state licenses. Once we built the winery, we hired a consultant who helped us through our first couple of winemaking seasons until we had gained enough first-hand experience to run the winery on our own, as we do today.

5. Swedenburg is a small winery, producing approximately 1,500-2,000 cases of wine a year. (A case is a box of 12 bottles.) We started out producing a Riesling and a Chantilly, and our Chardonnay was ready about eight months after we opened. Today, we have four whites and three reds ranging in price from $10 to $15. We have won over 200 awards at international wine competitions, including Amenti Delvino (Cromwell, CT), Indiana State Fair, State Fair of Virginia (Charlottesville, VA), American Wine Society, Beverage Tasting Institute (Chicago, IL), Dixie Classic (Durham, NC), Virginia Governor's Cup (Richmond, VA), Homestead Wine Competition, San Diego Wine Competition, National Orange Show (Riverside, CA), Vinifera Winegrowers' Association (Lansdowne, VA).

6. We sell the vast majority of our wine – approximately 90-95 percent – to visitors to the winery. In the year 2000, we had approximately 6,000 visitors, and in 1999, we had approximately 5,500 visitors. About half our visitors are people who live outside the state of Virginia.

7. Since the direct shipping laws have become a focus of popular attention and more people are aware of the bans on direct shipping, we do not receive as many direct shipping requests as we used to, especially from customers outside the state. The majority of our direct shipping is now to customers within Virginia. As a result of all the publicity about the direct shipping bans that exist across the country and

the existence of the bans themselves, our direct shipping sales have declined from approximately ten orders a month to approximately one order a month. We require a minimum order of 12 bottles per shipment because shipping is so expensive.

8. If we did not have out of state visitors, we could not manage. There is not enough consumption of Virginia wines within Virginia for us to survive without selling to out of state people.

9. In March, I had a call from someone in New York who said he was a previous customer of ours. I asked him how he found out about us and he said that he had been to the winery and bought wine from us in the past. He was asking for current prices and about shipping. I told him we could not ship to him because of New York's direct shipping ban, but I invited him to come visit the winery.

10. Swedenburg Winery would be sending brochures and price lists to New York if not for the New York law. I have given printed information about our wines to New York residents who have visited the winery, and if not for this lawsuit, I would have mailed a Swedenburg wine list to the New York customer who called in March. I send out our wine list all the time and include it every time I ship wine to a customer because it has the directions to our winery, descriptions and prices of the wines, and our phone number.

11. Swedenburg Winery does not have a wholesaler in New York or any other state and our wines are not carried in any state other than Virginia; our sales to out of state customers are all direct. Years ago, we had a wholesaler in Virginia, but the relationship was not helpful or valuable. The wholesaler sold no more than ten cases of our wine a year, and I would have to go recover wines from him every so often in order to

keep him from selling old vintages. We are just too small for a relationship with a wholesaler to be worthwhile.

12. However, I know there are people in New York who would like to buy our wine. In January 2000, I received a letter from New York resident Robin Brooks asking me to ship her some wine. She enclosed a copy of her driver's license as proof of her age. I wrote her back that I could not fill her order because of New York's direct shipping ban.

13. We see a great many visitors to the winery who come from New York and carry wine back with them to New York. We would ship directly to these New York customers if not for the New York law banning such shipments. We have also had New York customers in the past, but customers are like babies – they have to be taken care of. If you tell them no or that they cannot have something, as we have to do because of New York's direct shipping ban, they are gone.

14. The only reason I did not ship wine to New York resident Robin Brooks when she placed an order in January 2000 and the only reason I cut off the New York customer who called in March is the New York direct shipping ban. Can you imagine running a business where when a customer asks about buying your product, you have to tell them to get lost? But that is exactly what I have to do because of the archaic New York laws. They are completely out of step with modern times.

/s/ Juanita G. Swedenburg
Juanita Swedenburg

Subscribed and sworn before me this
22nd day of May 2001.

Notary Public, City of Middleburg,
County of [ILLEGIBLE] State of Virginia.

/s/ Hilda G. Pleece
Notary Public

My Commission expires 8-31-01

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

Exhibit P to Plaintiffs' Notice of Motion for Summary Judgment, dated June 7, 2001 – Affidavit of John Dyson, sworn to on May 24, 2001

AFFIDAVIT OF JOHN DYSON

CITY OF NEW YORK)
) SS.
STATE OF NEW YORK)

John Dyson, being first duly sworn, upon oath, states as follows:

1. I am adult citizen, residing in Manhattan. I make this affidavit based upon my personal knowledge of the facts stated herein.

2. I am the majority owner of Millbrook Winery in Millbrook, NY. I also own, with partners, a vineyard and winery in California, a vineyard and winery in Italy, and an investment firm.

3. I received a Bachelor of Science degree from the College of Agriculture at Cornell University in 1965. I earned a Master of Public Affairs degree from the Woodrow Wilson School at Princeton University in 1967.

4. In addition to my career in the private sector, I have held a number of positions in state and local government. In 1975, I was appointed Commissioner of Agriculture for the State of New York by Governor Hugh Carey.

From 1976-79, I served as Commissioner of Commerce for the State of New York. Subsequently, Governor Hugh Carey and Governor Mario Cuomo appointed me to the New York Power Authority. From 1994-96, I served as Deputy Mayor for Economic Development and Finance for the City of New York under Mayor Rudolph Giuliani.

5. In 1979, I bought acreage in Millbrook, NY, and, subsequently, I experimented with grapes with the goal of opening a winery if the property yielded a good crop. My first crop was harvested in 1982 and the wine was produced in a garage. It was a success. Thereafter, I planted additional property for a total of five acres, and Millbrook Winery produced its first commercial vintage wines in 1985. Initial production totaled approximately 500 cases.

6. Today, Millbrook Winery produces approximately 12,000 cases annually, mostly from grapes grown on my farm. We grow mostly Chardonnay, Tocai Friulano, and Cabernet Franc grapes.

7. Millbrook Winery holds a winery permit from the U.S. Bureau of Alcohol, Tobacco, and Firearms (Exh. A), which authorizes it "to sell, offer or deliver for sale, contract to sell or ship, in interstate or foreign commerce," the wine we produce. It also holds a "Winery/Farm Winery Retail License" (Exh. B) from the State of New York. Millbrook Winery is bonded (Exh. C) to ensure payment of taxes to the State of New York and the Federal Government.

8. I am active in the Wine Grape Foundation, the principal trade association for New York wineries. The New York wine industry has grown into one of the nation's most vibrant. There are approximately 140 wineries in the State of New York, concentrated in four major wine

regions: Long Island, Hudson Valley, the Finger Lakes, and Lake Erie. All of the wineries except Canandiagua are small.

9. Tourists are a significant factor in all of the State's wine-producing regions. Many tourists are drawn by the wineries themselves, while others discover New York wineries while visiting other attractions in those regions. Many of the tourists visit from other states and countries.

10. While I was Agriculture Commissioner, the State of New York passed farm winery legislation, allowing farm wineries to sell wine directly to members of the public on weekends. The law was designed to help stimulate small wineries. It was necessary because wines from small New York wineries are often difficult to find in retail establishments, particularly outside the State of New York. As a result, any customers would not be able to purchase New York wines unless the wineries could sell it directly to their customers. Moreover, a large percentage of sales occur at the point of contact, after a customer has tasted wines on the winery premises.

11. Under New York law, farm wineries also may operate one retail establishment in New York State to sell their wines.

12. The benefits of farm winery status accrue only to wineries below a certain size. Many if not most New York wineries are farm wineries.

13. All New York wineries also may ship directly to customers within the State of New York, including restaurants and retailers. A Prohibition-era law forbidding credit was repealed, so that New York wineries can take orders

using credit cards and ship wine to their customers without a face-to-face transaction.

14. Millbrook Winery has been quite extensively selling and shipping directly to New York consumers since the 1980s. We maintain a website and customers can order wine on-line. Direct sales and shipments are a vital part of our business. In 1999, we shipped 2,984 packages of one or more bottles to New York consumers. In 2000, we shipped 3,179 packages. Most of the shipping is provided by United Parcel Service. We sell and ship directly to both individual consumers and restaurants.

15. We require a check or credit card for all orders, and a signature of someone 21 years of age or older to receive all shipments. Additionally, all packages contain a sticker indicating the adult signature requirement, and no packages are left without a signature. Over nearly two decades, we have shipped tens of thousands of packages to New York consumers. During that time, I am not aware of a single problem or complaint concerning shipments to underage purchasers. Reports of minors ordering wine in the context of "sting" operations simply do not happen often, if at all, in the real world.

16. The procedures we use to prevent underage access are not required by New York law, to my knowledge. Our procedures in that regard have never been a focus of attention from the New York State Liquor Authority.

17. Until recently, Millbrook Winery used a New York Wholesaler, Lauber Imports, to sell some of its products in the State of New York. We discontinued that relationship because it was expensive and inefficient. The markup added by wholesalers averages between $20 and

$40 per case, whereas we can ship wine for approximately four dollars per case. The cost difference between distributing through wholesalers and shipping directly produces lower prices and/or greater profits. At the same time, growing consolidation in the wholesaler industry means that most wholesalers pay less attention to small wineries, whose products are often lost amidst an ever-growing array of wineries in their "book." Wholesalers have every incentive to cater to their larger suppliers.

18. As a result, about a year and a half ago, Millbrook Winery decided to discontinue its relationship with a New York wholesaler. We now sell and distribute all of our wines directly to retail and individual customers. As a consequence, we have been able to reduce costs and increase profits, as well as lowering the price for our customers.

19. A substantial potential out-of-state market exists for New York wines, attested by the large number of tourists who purchase wines from New York wineries and the large number of requests for direct shipments from out-of-state customers. Millbrook Winery used to sell and ship directly to out-of-state customers until states started cracking down on such shipments. We no longer sell and ship directly to out-of-state customers. The out-of-state sales had been very profitable because they were at the retail as opposed to the wholesale price. Curtailing them reduced profits by 13 percent and led to reduced employment.

20. We maintain agreements with wholesalers in approximately one dozen states. It is an expensive, cumbersome, and inefficient process. Because wholesalers typically do not market wines from small producers, the

winery must send representatives to cultivate orders from retailers or restaurants. But the winery cannot take the order; we must refer the customer to a wholesaler. The wholesaler usually will not agree to carry a wine unless the winery offers a "program," i.e, a price discount. We have to do all of the sales work. The wholesaler adds nothing to the enterprise except distribution, which we could do more cheaply and efficiently. The process is so expensive and unwieldy that Millbrook Winery is effectively shut out of more than half the states. Given that most New York wineries are even smaller, the effect of the three-tier system on them is even greater.

21. This effect would be reduced greatly if New York would allow out-of-state wineries to ship directly to New York consumers on a reciprocal basis. Approximately one dozen states offer reciprocity to states that allow direct shipping into their states. Reducing trade barriers would open enormous outlets for New York wineries to sell their products.

22. My California winery, Williams & Selyem, depends on out-of-state direct shipments for about a third of its business. It also is creating a website advertising its products. Approximately 95 percent of its sales are directly to customers in states to which we are allowed to ship.

23. Different rules exist governing sales and shipments of wines in the states into which we are allowed to ship directly to consumers. Generally, they are easy to navigate. We are careful to follow the laws in other states because our federal license is at stake, and now states have the authority to enforce their laws in federal court. Williams and Selyem collects a .60 per gallon wine tax and a seven percent of retail price sales tax on wine shipped

into Rhode Island. Williams and Selyem collects a .40 wine tax (on wines .5% to 14%) and a .75 wine tax (on wines 14.1% to 22%) as well as a sales tax (paid on the county tax rate where the wine is shipped) on wines shipped to Nevada. Williams and Selyem collects an 8% sales tax based on the retail price of the wine less shipping charges on wines shipped to New Hampshire. Williams and Selyem collects a .40 (for 14% or less) and .67 (for over 14%) wine tax on wine shipped into Georgia. No wine or sales tax is paid on wine shipped to reciprocal states.

24. No license exists in New York for out-of-state wine producers to sell or ship wine to New York consumers.

25. A large potential market exists for out-of-state wineries that are not represented by New York wholesalers. The impact is not necessarily on the total volume of wine imported into New York, but on the producers whose wine is sold. Relatively few out-of-state wineries are handled by the major New York wholesalers. It would be uneconomical, if not impossible, for wholesalers to represent all out-of-state wineries; particularly wineries that produce a small volume of wines. Only specialty wholesalers will carry them, if any wholesalers will; and it is not easy for consumers to find them. California alone has several hundred wineries, most of which produce small volumes of wine. The current system effectively prevents them from selling their wine in New York. Only through direct sales would the New York market be open to them. Multiply that impact several hundred-fold and we can begin to understand the impact of New York's direct shipment prohibition on interstate commerce in general and small family-owned wineries in particular.

26. If other out-of-state wineries were allowed to ship to New York, they easily could abide the same requirements that New York wineries must follow in shipping directly to retailers and other consumers within New York. Sales taxes can be easily collected and other requirements are not onerous.

27. Any suggestion that elimination of the direct shipment prohibition would harm New York wineries is nonsense. The wholesaler laws were not put in place for the benefit of New York wineries. We have nothing to fear from greater ease of entry into the New York market. Abundant competition already exists. Rather, New York wineries are shut out of out-of-state markets and thus are losing sales because of our own state's protectionist laws.

28. Out-of-state markets offer huge potential to New York wineries. Tens of thousands of consumers are favorably exposed to New York wines every year. Before various states started cracking down on out-of-state direct shipments, New York wineries sold a great deal of wine directly to out-of-state consumers. As a result of New York's own trade barriers, those out-of-state markets have all but disappeared.

29. The purpose of New York's law is to protect the middleman. In most other industries, distributors have largely disappeared because they are expensive and inefficient. They are demonstrably so here, having the perverse effect of limiting access to markets for small wineries rather than facilitating them. The New York law operates solely for the benefit of wholesalers.

30. Given my experience from multiple perspectives, I can attest that eliminating the requirement that out-of-state wineries may distribute their wine only through

wholesalers, thereby allowing direct sales and shipments of wine from out-of-state producers to New York consumers, would benefit out-of-state wineries, New York wineries, especially, and consumers. The prohibition as it now stands is pure protectionism for the benefit of wholesalers, and to the detriment of everyone else involved in the process.

/s/ John A. Dyson
John Dyson

Subscribed and sworn before me this
24 day of May 2001.

Notary Public, City of New York,
State of New York.

/s/ Maureen Webb
Notary Public

My Commission expires___.

MAUREEN WEBB
Notary Public, State of New York
No. 01WE6024321
Qualified in Kings County
Commission Expires 5/10/03

Exhibit A to Dyson Affidavit –
Millbrook Winery permit
from the U.S. Bureau of
Alcohol, Tobacco and Firearms

DEPARTMENT OF THE TREASURE – BUREAU OF ALCOHOL, TOBACCO AND FIREARMS	1. PERMIT NUMBER NY-W-126
	2. DATE OF PERMIT October 29, 1985

BASIC PERMIT (Under Federal Alcohol Administration Act)	3. REGISTRY NO. (if applicable) BW-NY-716
	4. DATE OF APPLICATION FOR AMENDMENT September 2, 1998
5. NAME AND ADDRESS OF PERMITTEE (Number and street, city or town, State and ZIP Code) MILLBROOK WINERY, INC. T/A MILLBROOK VINEYARDS T/A VERAISON WINE CELLARS T/A MILLBROOK VINEYARDS & WINERY T/A WILLIAMS & SELYEM WINERY R.R. #1, BOX 167D MILLBROOK, NEW YORK 12545	[SEAL]
6. TRADE NAME AUTHORIZED BY THIS PERMIT (Trade name approval does not constitute approval as a brand name for labeling purposes. If needed, list on reverse or use continuation sheet.) Mistral Williams & Selyem Millbrook Vineyards & Winery	

7. PERMIT GRANTED FOR (ONE TYPE OF OPERATION ONLY).

Pursuant to the application of the data indicated in item 4, you are authorized and permitted to engage, at the above address, in the business of:

a. ☐ Distilled Spirits– ☐ distiller ☐ rectifier (processor) ☐ warehouseman and/or ☐ warehouseman and bottler and while so engaged, to sell, offer or deliver for sale, contract to sell or ship, in interstate or foreign commerce, the distilled spirits so distilled or rectified, or warehoused and bottled, or the wines so rectified.

b. ☒ Wine – ☒ producer and blender ☐ blender and while so engaged, to sell, offer or deliver for sale, contract to sell or ship, in interstate or foreign commerce, the wine so produced or blended,

c. ☐ Importer – importing into the United States the following alcoholic beverages: and while so engaged, to sell, offer to deliver for sale, contract to sell or ship, in interstate or foreign commerce, the alcoholic beverages so imported.

d. ☐ Wholesaler – Purchasing for resale at wholesale the following alcoholic beverages: and while so engaged, to receive or to sell, offer or deliver for sale, contract to sell or ship, in interstate or foreign commerce, the alcoholic beverages so purchased.

This permit is conditioned upon your compliance with the Federal Alcohol Administration Act; the Twenty-First Amendment and the laws relating to its enforcement; all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect to them; the Federal Water Pollution Control Act; and, all applicable regulations made pursuant to law which are now, or may hereafter be, in force.

This basic permit is effective from the date shown above and will remain in force until suspended, revoked, annulled, voluntarily surrendered, or automatically terminated.

THIS PERMIT WILL AUTOMATICALLY TERMINATE THIRTY DAYS AFTER ANY CHANGE IN PROPRIETORSHIP OR CONTROL OF THE BUSINESS, unless an application for a new basic permit is made by the transferee or permittee within the thirty day period. If an application for a new basic permit is timely filed, the outstanding basic permit will continue in effect until the application is acted on by the Regional Director (Compliance). Bureau of Alcohol, Tobacco and Firearms.

THIS PERMIT IS NOT TRANSFERABLE, ANY CHANGE IN THE TRADE NAME, CORPORATE NAME, MANAGEMENT OR ADDRESS OF THE BUSINESS COVERED BY THIS PERMIT, OR ANY CHANGE IN STOCK OWNERSHIP (MORE THAN 10%) MUST BE REPORTED TO THE REGIONAL DIRECTOR (COMPLIANCE) WITHOUT DELAY.

THIS IS AN ☐ ORIGINAL PERMIT ☒ AMENDED PERMIT

REASON FOR AMENDMENT	DATE OF AMENDMENT
Addition of labeling and operating trade name	March 23, 1999

SIGNATURE OF REGIONAL DIRECTOR (COMPLIANCE), BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

/s/ Grace K. Reynolds

by [for] James W. McMonagle, Chief, Technical Services

Exhibit B to Dyson Affidavit –
Millbrook Winery "Winery/Farm Winery
Retail License" from the State of New York

[SEAL]

WINERY/FARM RETAIL LICENSE	LICENSE EFFECTIVE 04/01/1999
20 2 DUTC WA 0052L 305	LICENSE EXPIRES 03/31/2000

NEW YORK STATE LIQUOR AUTHORITY

MILLBROOK WINERY INC WING ROAD RR 1 BOX 167D MILLBROOK NY 12545	CYCLICAL CREDIT GROUP	
	FILING FEE	25.00
	LICENSE FEE	125.00
	COUNTY	DUTCHESS
	SERIAL	00521
	CERTIFICATE NUMBER	479949

THE LICENSEE DESIGNATED ABOVE IS HEREBY GRANTED PERMISSION, UNDER THE ALCOHOLIC BEVERAGE CONTROL LAW TO TRAFFIC IN ALCOHOLIC BEVERAGES PURSUANT TO THE TYPE OF LICENSE INDICATED IN THE UPPER LEFT HAND CORNER OF THIS CERTIFICATE AND ACCORDING TO THE STATUTES AND REGULATIONS PERTAINING THERETO.

THIS LICENSE SHALL NOT BE TRANSFERABLE TO ANY OTHER PERSON OR TO ANY OTHER PREMISES OR TO ANY OTHER PART OF THE BUILDING CONTAINING SUCH LICENSED PERMISES: IT SHALL NOT BE DEEMED A PROPERTY OR VESTED RIGHT AND MAY BE REVOKED AT ANY TIME PURSUANT TO

LAW FOR ANY OF THE CAUSES PRINTED ON THE REVERSE SIDE HEREOF

EDWARD F. KELLY
CHAIRMAN

XXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXX
Chairman

* * *

IF THERE BE A DOOR OPENING FROM THE STREET INTO THE LICENSED PREMISES AND A WINDOW FACING THE STREET UPON WHICH SUCH DOOR OPENS, THIS LICENSE SHALL BE DISPLAYED IN SUCH WINDOW, SO IT MAY BE READILY SEEN FROM THE STREET.

Certificate No. F479949

Exhibit C to Dyson Affidavit –
Bond held by Millbrook Winery

EXCISE BOND UNDERWRITERS
100 WILLIAM STREET – NEW YORK, N.Y. 10038

Bond Form L-9 Prescribed by New York State Liquor Authority November 1963

BOND IN SUPPORT OF APPLICATION FOR LICENSE OR PERMIT UNDER THE NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW

LIQUOR ***DUPLICATE***

014-17 X-B12623 – 25

BOND EXPIRES IN SEPTEMBER,

BOND NUMBER 05-46-176735

KNOW ALL MEN BY THESE PRESENTS, that we,	Penal Sum of Bond 10,000.00 Plus Costs
Name of Applicant	Address of Place of Business
MILLBROOK WINERY, INC.	WING ROAD MILLBROOK, NY 12545

In the county of DUTCHESS State of NEW YORK as Principal, and INSURANCE CO. OF NORTH AMERICA, having an office and usual place of business at 195 BROADWAY, NEW YORK, NY 10007

_____

_____ L.S.

Principal

INSURANCE CO. OF NORTH AMERICA

BY: _____

/s/ _____

Attorney in fact

↑

APPLICANT MUST SIGN HERE

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

Affidavit of Walter Hellerstein, sworn to on July 31, 2001, in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, dated August 17, 2001

AFFIDAVIT OF WALTER HELLERSTEIN

STATE OF GEORGIA)
) ss.
County of Clarke)

Walter Hellerstein, being duly sworn, deposes and states as follows:

1. My name is Walter Hellerstein. I give this affidavit for use by Defendants and Intervenor-Defendants in connection with the above captioned litigation. The opinions expressed are my best professional judgment relying on my experience and utilizing materials regularly and reasonably relied upon by persons in my field.

2. I am the Francis Shackelford Professor of Taxation at the University of Georgia School of Law, where I have taught since 1978. I have devoted most of my professional life to the study of state and local taxation and have written extensively about state and local taxation. My experience and scholarly work in the field of state and local taxation are reflected in my current resume, which I have attached hereto as Exhibit A.

3. I have been accepted as an expert witness on matters involving state and local taxation in *Central Telephone Co. v. North Carolina Department of Revenue*, No. 2000-5, North Carolina Department of Revenue, August 16, 2000; *Appeal of Panhandle Eastern Pipe Line Co., et al.*, Nos. 98-6865-DT, 98-6866-DT, Kansas Board of Tax Appeals, Sept. 16, 1999; *Springs Industries, Inc. v. South Carolina Department of Revenue*, No. C.A. No. 99-ALJ-17-0153-CC, South Carolina Administrative Law Judge Division, May 26, 1999; *Pennzoil Company and Subsidiaries v. Department of Revenue*, No. 4301, Oregon Tax Court, March 10, 1999; *In the Matter of the Protest of KMART Properties, Inc.*, ID No. 02-297446-00 6, Assessment Nos. 213646 and 213647, Before the Taxation and Revenue Department of the State of New Mexico, Nov. 20, 1998; *The Williams Companies Inc & Subsidiaries v. Department of Revenue of the State of Montana*, Case No. CT-1996-1, Montana State Tax Appeal Board, July 27-28, 1998; *General Motors Corporation, et al. v. Director of Revenue, State of Missouri*, Cause No. 96-001882RI, Missouri Administrative Hearing Commission, August 18, 1997; *Fleming Foods of Texas, Inc. v. Sharp*, No. 96-12390, Travis County, Texas District Court, 53rd Judicial District, March 10, 1997; *General Motors Corporation d/b/a General Motors Emissions Laboratory v. City and County of Denver*, No. 950401, Treasury Division, Department of Revenue, City and County of Denver, July 23, 1996; *In re Chrysler Corporation*, No. 40-910308-2, Philadelphia Tax Review Board, Sept. 14, 1995; *Mississippi Power & Light Co., et al. v. Mississippi State Tax Commission*, Civil Action Nos. 154,261-154,263, Chancery Court of the First Judicial District of Hinds County, Mississippi, December 13, 1994; *Peabody Coal Co. v. The Navajo Nation*, No. CIV 88-0931-PCT-BMV, United States District Court for the

District of Arizona, March 18, 1994; *Chevron U.S.A., Inc. v. Mississippi State Tax Commission*, Cause No. 148,792, Chancery Court of the First Judicial District of Hinds County, Mississippi, January 25, 1993; *H. A. True, Jr., et al. v. Tax Commissioner of the State of North Dakota*, Civil No. 38367, North Dakota District Court, South Central Judicial District, Burleigh County, October 12, 1989; *American Telephone & Telegraph Co. v. Commissioner of Revenue*, Docket Nos. 146547-146550, Massachusetts Appellate Tax Board, June 7, 1989; *J.C. Penney Co. v. City of Tacoma*, Docket No. 271861, Superior Court, Pierce County, State of Washington, March 10, 1989; *American Telephone and Telegraph Co. v. State Tax Appeal Board*, Docket No. CDV 86-823, District Court of the First Judicial District of the State of Montana, Lewis and Clark County, June 6, 1988; *Burlington Northern Railroad Co. v. Wyoming State Tax Department*, No. C-87-0252, United States District Court for the District of Wyoming, May 1, 1988; *Union Pacific Railroad Co. v. Public Utility Commission of the State of Oregon*, Civil No. 86-778-PA, United States District Court for the District of Oregon, July 13, 1987; *Kansas City Southern Railway v. McNamara*, 624 F. Supp. 395 (M.D. La. 1985); *In re Factual Issues in Cause No. 83-551 of the Supreme Court of Montana (Burlington Northern, Inc. v. Schwinden)*, District Court of the First Judicial District of the State of Montana, Lewis and Clark County, May 25, 1984; and *Alabama Great Southern Railway v. Eagerton*, 541 F. Supp. 1084 (M.D. Ala. 1982).

4. I have testified at the invitation of Committees of the United States Congress on matters involving state and local taxation in *Hearings on H.R. 1054, the "Internet Tax Freedom Act." Before the Subcomm. on Commercial and Administrative Law of the House Committee on the*

Judiciary, 105th Cong., 1st Sess. (July 17, 1997); *Hearings on the Effect of Interstate Branching on National, State, and Local Economics Before the Subcommittee on Economic Stabilization of the House Committee on Banking, Finance, and Urban Affairs*, 102d Cong., 1st Sess. (May 15, 1991), *Hearings on the Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary*, 100th Cong., 2d Sess. (Sept. 21, 1988), *Hearings on the Severance Tax Equity Act of 1982 Before the Subcommittee on Energy and Agricultural Taxation of the Senate Committee on Finance*, 98th Cong., 2d Sess. (July 24, 1984), and *Hearings on the Commerce Clause and State Severance Taxes Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Affairs*, 97th Cong., 1st Sess. (July 15, 1981). I have testified before state legislative bodies in the following states on the following matters relating to state and local taxation: Florida, sales tax on services; Georgia, severance tax on kaolin; Louisiana, coastal wetlands environmental levy; Michigan, Single Business Tax apportionment; and Texas, criteria for a viable state tax structure. I have testified at the invitation of the Advisory Commission on Electronic Commerce created by Congress on "The Law of Sales Taxation in a Cyberspace Economy" (June 22, 1999).

5. I have consulted with states and with private industry on a wide variety of issues involving state and local taxation and related matters. My consulting activities with states include: Alaska, providing advice regarding the constitutionality of proposals to revise Alaska's oil and gas income tax and drafting substantial portions of the state's briefs in *South-Central Timber Development,*

Inc. v. Wunnicke, 467 U.S. 82 (1984); Delaware, providing advice regarding state income tax issues; Florida, drafting legislation for a sales tax on services and defending the constitutionality of the legislation in the Florida courts; Georgia, providing advice to the Georgia Department of Revenue on income, sales and use, and property tax issues; Louisiana, drafting legislation for a coastal wetlands environmental levy and defending the constitutionality of the legislation before legislative bodies; Montana, drafting substantial portions of the state's briefs in the state district court, the state supreme court, and the United States Supreme Court defending the constitutionality of Montana's coal severance tax in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); North Dakota, providing expert assistance in a state income tax controversy; Texas, serving as a consultant to the Texas Select Committee on Tax Equity; and Virginia, defending the State Department of Revenue in an income tax refund suit. My consulting activities with private industry include advice and assistance on income, sales and use, property, and miscellaneous excise taxes, particularly with regard to federal constitutional issues raised by such levies, and I have participated on behalf of private industry in litigation before the United States Supreme Court in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Trinova Corp. v. Michigan Department of Treasury*, 498 U.S. 358 (1991), *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992), a case I argued; *Colgate Palmolive Co. v. Franchise Tax Board*, 512 U.S. 298 (1994), *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and *Hunt-Wesson, Inc.*

v. Franchise Tax Board., 528 U.S. 458 (2000), a case I argued.

6. I have frequently been a faculty member at continuing education programs devoted to state and local taxation, as indicated on pages 2-4 of my resume (see Exhibit A).

7. In connection with the preparation of this affidavit, I have reviewed, among other things, (a) the complaint; (b) the memoranda of law filed in support of and opposition to the motion to dismiss; (c) the court's decision and order denying defendants' motion to dismiss; (d) the affidavits of Robert Eyler and Hans L. Stern; (e) plaintiffs' memorandum in support of their motion for summary judgment; and (f) various state statutes relating to taxation of alcoholic beverages.

The Historical Tradition of Imposing "Sin" Taxes on the Alcoholic Beverage Industry

8. There is a long history in state taxation of singling out alcoholic beverages and tobacco products for special excise taxes (apart from and in addition to the traditional retail sales tax) for the dual purposes of (1) raising revenue and (2) discouraging consumption of such products by increasing their cost to the consumer.

The Legal Framework Governing State Taxation of Interstate Sales

9. Under the U.S. Supreme Court's interpretation of the Commerce Clause of the Federal Constitution, the states lack the constitutional power to impose a sales tax on goods purchased in other states or in interstate

commerce because "to impose a tax on such a such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 328 (1944). The constitutional prohibition on the states' taxation of sales consummated outside their borders or in interstate commerce created a troublesome gap in their consumption tax structures. The gap created two concerns. First, states feared the loss of business that local merchants would suffer when prospective customers made out-of-state or interstate purchases to avoid in-state sales tax liability. Second, states feared the loss of revenue they would incur as a result of the diversion of sales tax to non-tax states. To deal with this potential loss of business and revenue, states enacted "complementary" or "compensating" use taxes on the use of goods purchased outside the state and brought into the state for use.

10. Compensating use taxes are functionally equivalent to sales taxes. They are typically levied upon the use, storage, or other consumption in the state of tangible personal property that has not been subjected to a sales tax. The use tax imposes an exaction equal in amount to the sales tax that would have been imposed on the sale of the property in question if the sale had occurred within the state's taxing jurisdiction. The state overcomes the constitutional hurdle of taxing an out-of-state or interstate sale by imposing the tax on a subject within its taxing power – the use, storage, or consumption of property within the state. See *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (sustaining constitutionality of state use tax scheme). In principle, then, the in-state purchaser stands to gain nothing by making an out-of-state or interstate purchase free of sales tax because he or she will

ultimately be saddled with an identical use tax when the property is brought into the taxing state. Taken together, sales and use taxes provide a uniform scheme of taxation on goods purchased within the state and goods purchased outside the state for "storage, use, or consumption" within the state. Every one of the 45 states (and the District of Columbia) that imposes a sales tax also imposes a compensating use tax.

11. State sales taxes generally are collected by the vendor from the purchaser, and all states have some system for registering vendors as collection agents. Once a vendor registers with the state, it is authorized to make sales at retail, and it is required to collect and remit taxes on taxable sales. Accordingly, when a registered vendor within the state delivers taxable goods to a purchaser within the state, it must collect the sales tax due, unless the purchaser presents it with a certificate establishing that the sale is exempt (e.g., a resale certificate) or that the purchaser has a "direct pay" permit allowing it to self-assess the tax and pay it directly to the taxing authority. A vendor is ordinarily liable (either primarily or secondarily) for tax on any taxable transaction, whether or not it collects it from the purchaser. There are no constitutional difficulties in requiring the registered vendor to collect the sale tax.

12. When interstate sales of taxable goods are involved, the use tax rather than the sales tax is applicable. As explained above, it is beyond dispute that the purchaser is legally liable for the tax on the use of the taxable goods or services within the taxing state. It is also settled law, as the U.S. Supreme Court declared in one of the seminal cases establishing the constitutionality of the use tax and the vendor's obligation to collect the tax, that

making "the distributor the tax collector for the State is a familiar and sanctioned device." *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 338 (1944). In the use tax context, however, the implementation of this "familiar and sanctioned device" of making the vendor the collection agent for the state can encounter constitutional difficulties that do not arise in the sale tax context.

13. Because the use tax generally applies to transactions involving interstate sales, and the vendor often has little or no physical presence in the state, it raises the constitutional question whether the state has the jurisdictional power to require the vendor to register and collect the tax. The U.S. Supreme Court has declared that it is a "fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection between a state and the person, property, or transaction its seeks to tax.'" *Allied Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 777 (1992) (quoting *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954)). This so-called "nexus" requirement derives from the virtually axiomatic proposition that the exercise of a state's tax power over a taxpayer or its activities is justified by the "protection, opportunities and benefits" (*Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)) the state confers upon the taxpayer or its activities. If the state lacks the "definite link" or "minimum connection" with the taxpayer or its activities, it has not "given anything for which it can ask return." *Id.* In the context of use taxes, the essential question becomes whether there is a sufficient connection with (and, hence, jurisdiction over) the out-of-state vendor to justify the state's enlisting the vendor to collect tax on its sales to in-state purchasers.

14. In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), the U.S. Supreme Court first considered the question whether a state could require an out-of-state mail-order vendor with no physical presence in the state to collect a use tax on goods sold to in-state purchasers. In that case, Illinois sought to compel a Missouri mail-order seller to collect a use tax on goods sold to Illinois purchasers. National Bellas Hess challenged the tax under both the Due Process and Commerce Clauses of the Federal Constitution. After reiterating that there must be "some definite link, some minimum connection between a state and the person, property or transaction its seeks to tax," id. at 756 (quoting *Miller Bros. v. Maryland*, 347 U.S. 340, 344-345 (1954)), and that such a "link" or "connection" between the out-of-state vendor and the state was a prerequisite to imposing on a vendor the duty to collect use tax, the Court concluded that Illinois had exceeded the limits established by the Court's precedents. The Court stated it "has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." *Id.* at 758. The Court focused specifically on the lack of harmonization in the states' retail sales tax regimes, which created intolerable burdens on distance sellers if they could be required to collect use taxes in all states and localities into which they shipped the goods they sold:

> The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of local government."

Id. at 759-60 (footnotes omitted). Declaring that the "very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements," *id.* at 760, the Court held the assessment unconstitutional.

15. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Supreme Court reaffirmed the rule of *Bellas Hess* and held that the Commerce Clause bars a state from imposing a use tax collection duty on an out-of-state seller with no physical presence in the state. In so holding, however, the Court made it clear that the Due Process Clause was no bar to the imposition of a use tax collection obligation on an out-of-state seller with no physical presence in the state as long as the out-of-state seller was purposefully directing its efforts towards residents of the taxing state. Instead, the Court in *Quill* rested the physical presence-requirement entirely on the Commerce Clause.

16. In delineating the due process restraints on a state's power to require an out-of-state vendor to collect use taxes with respect to sales of mail-order goods to purchasers within the state, the Court in *Quill* observed that "[d]ue process centrally concerns the fundamental fairness of governmental activity," *id.* at 312, and it explained that "due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him." *Id.* The Court had held in the analogous area of judicial jurisdiction that "if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State." *Id.* at 307. Applying these standards to the imposition of a tax collection requirement

upon an out-of-state vendor, the Court declared that, so long as an out-of-state mail-order vendor purposefully directs its solicitation towards residents of the taxing State, "it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: the requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Id.* at 308.

17. Even assuming that a taxpayer has due process nexus with a state, however, the Court in *Quill* concluded that there are different nexus inquiries under the Due Process Clause and the Commerce Clause. Consequently, "a corporation may have 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Id.* at 313. Specifically, because the principal concern of the Commerce Clause is national economic unity and "the effects of state regulation on the national economy," *id.* at 312, the Court in *Quill* found that these concerns gave rise to a nexus inquiry that focused on the burdens the tax collection obligation imposed on interstate commerce rather than on the fairness of imposing the obligation on the out-of-state vendor. After assessing those burdens in light of the unharmonized patchwork of sales taxes imposed by state and local taxing jurisdictions, the Court in *Quill* concluded that the physical-presence test of nexus it had articulated 25 years earlier in *Bellas Hess* remained the Commerce Clause "substantial nexus" standard governing state use tax collection obligations. The Court defended the "bright-line" physical-presence rule of nexus on the ground that it "firmly establishes the boundaries of legitimate state authority," "reduces litigation," "encourages settled

expectations," and, serves the "'interest in stability and orderly development of the law' that undergrids the doctrine of *stare decisis*. . . . " *Id.* at 315-17 (citations omitted).

The Impact of Existing Constitutional Restraints on State Taxing Power on the States' Ability to Collect Taxes from Remote Vendors

18. Under the legal framework described above, the states lack the constitutional power to require a vendor without physical presence in the state to collect taxes on products that the vendor ships to consumers in the state. Because it is not practical to collect such taxes from individual purchasers, the states lose billions of dollars of revenue each year from their inability to require out-of-state vendors to collect use taxes on products they sell to in-state consumers.

19. If this constitutional framework were applicable to the direct sale of wine from out-of-state vendors to in-state consumers, it is my opinion that the states would lose the practical ability to collect taxes on such products. The existence of legislation in Louisiana, New Hampshire, and Nevada referred to in the affidavit of Hans L. Stern that "includes provisions for wineries' payment of taxes to states in which consumers receive their product" (Stern Affidavit, ¶ 77) does not change my opinion. Indeed, the state statutes are filled with similar provisions mandating out-of-state vendors to collect taxes on their sales to in-state consumers.

20. For example, in Texas, as in many other states, there are provisions that assert broad authority to require any "retailer who sells a taxable item for storage, use, or

consumption in this state" to register with the taxing authority. Tex. Tax Code Ann. §§ 151.106 (West Supp. 2001). Furthermore, such statutes typically require a "retailer engaged in business in this state who makes a sale of a taxable item for storage, use, or consumption in this state" to "collect the use tax that is due from the purchaser." Id. § 151.103. The Texas statute, like those of many other states, considers a retailer to be "engaged in business in this state" if, among other things, it "engages in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items." Id. § 151.107(a)(4). Yet these statutes are plainly unenforceable under the Court's existing Commerce Clause jurisprudence as applied to vendors without physical presence in the state.

21. Indeed, the State of New York, recognizing the Commerce Clause restraints on its power to require an out-of-state vendor to collect sales and use taxes, explicitly limits its definition of a vendor required to register and collect such taxes as one whose in-state activity "satisfies the nexus requirement of the United States constitution," see N.Y. Tax Law §§ 1101(b)(8)(i), 1131 et seq. (McKinney 2000, Supp. 2001), i.e., the physical presence requirement of *Quill*. See *Orvis v. Tax Appeals Tribunal* and *Vermont Information Processing, Inc. v. Tax Appeals Tribunal*, 86 N.Y.2d 165, 654 N.E.2d 954, 630 N.Y.S.2d 680, *cert. denied* (in *Vermont Information Processing*), 516 U.S. 989 (1995).

New York's Alcoholic Beverage Control Law Provides an Effective Mechanism for Collection of Taxes on Wine Sold by Out-of-State Vendors

22. As the foregoing discussion reveals, if the constitutional framework described above were applicable to the direct sale of wine from out-of-state vendors to in-state consumers, it would have a devastating impact on New York's ability to collect taxes on or with respect to such wine sales. By contrast, New York's existing regime governing the sale of wine in the state provides an extremely effective mechanism for tax collection as opposed to the ineffective alternative to which Mr. Stern's affidavit alludes. Because virtually all retail sales of wine to consumers in the state must be made by a licensed retailer, the state can enforce collection of the sales tax on such sales, just as it enforces its sales tax with respect to other licensed retailers. Moreover, by requiring that out-of-state vendors sell their wine through licensed wholesalers, the state can assure collection of the liquor excise tax that would otherwise escape taxation if out-of-state vendors could sell their products directly to in-state consumers.

Further affiant sayeth not.

/s/ Walter Hellerstein
WALTER HELLERSTEIN

Subscribed and sworn to before me
this 31st day of July 2001.

/s/ Clair R. Drew
Notary Public

My commission expires 9/2/2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

Affidavit of Howard P. Kitt, sworn to on August 16, 2001, in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, dated August 17, 2001

AFFIDAVIT OF HOWARD P. KITT

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STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

HOWARD P. KITT, being duly sworn, deposes and says:

I. Introduction

1. I am an economist and Senior Vice President employed by National Economic Research Associates, Inc. ("NERA"), based in White Plains, New York. I have been designated by counsel for Defendants to provide expert testimony in this case. My resume has previously been submitted as an attachment to Defendants' designation of Howard P. Kitt to provide testimony. A copy is attached as Exhibit A.

II. Assignment

2. Counsel for Defendants have asked me to evaluate (1) the extent, if any, to which New York State law impedes out-of-state wineries' access to New York buyers; (2) the extent, if any, to which New York State law impedes

New York buyers' access to out-of-state wineries' wines; (3) the extent to which out-of-state wineries that wish to ship directly to New York State compete with New York wineries for the business of New York consumers; (4) whether New York State law protects New York wholesalers from competition; and (5) various issues raised by the affidavit of Dr. Robert Eyler.[1]

3. In carrying out this assignment, I reviewed a number of documents and pleadings produced by the parties as well as publicly available data and information. I, and/or members of my staff operating under my supervision and direction, also reviewed various deposition transcripts and spoke with a number of intervenor-defendants' personnel. A list of these items is attached to this affidavit. I also relied upon basic principles of modern microeconomic theory and my experience in analyzing issues of this type. My analysis is ongoing. Accordingly, I may extend and/or modify my analysis and conclusions as more information becomes available.

4. My principal conclusions can be summarized as follows:

i. Access to the New York State marketplace by wines produced out of state is effectively unimpeded.

ii. Access by New York State wine consumers to wines produced out of state is similarly unimpeded.

iii. In light of the economic realities of the New York State marketplace, New York State

[1] Affidavit of Robert Eyler, May 24, 2001 ("Eyler Affidavit").

wineries have little, if any, practical competitive advantage vis-a-vis out-of-state wineries.

iv. As a consequence of the above, the New York State wine market is openly, intensely and effectively competitive, and no producer or distributor is insulated from the forces of that competition.

5. My report is organized as follows: The next section (section III) sets out the main economic issues that I consider, and section IV presents evidence that addresses those issues. In Section V, I discuss economic incentives in the wine industry and their implications for some of the economic issues in question. Section VI discusses various aspects of Dr. Eyler's affidavit and deposition, and Section VII provides a brief conclusion.

III. The Economic Issues

6. As I understand it, Plaintiffs have alleged that New York law impedes the flow of wine from out of state. They may also allege that those who wish to sell wine in New York State that is produced outside New York are disadvantaged relative to those selling wine produced in New York. Whether New York law has any such effects is importantly a matter of factual investigation. Accordingly, from an economic perspective, the relevant question is: Does the three-tier structure or any distinctions between wine produced in New York and outside New York make any substantive economic difference? More specifically,

i. Does the existing legal structure in New York effectively restrict the sale in New York of wine that is produced out of state?

ii. Does the existing legal structure in New York effectively restrict New York consumers' ability to buy wine produced outside New York State?

iii. Does New York State law treat out-of-state wines and/or wineries in a way that protects in-state wineries from competition from out-of-state wineries?

iv. Does New York State law protect New York wholesalers from competition?[2]

7. No abstract or theoretical model can answer the questions posed above.[3] Only evidence on the actual performance of the industry can shed light on them. Unlike Plaintiffs' expert Dr. Eyler, therefore, I do not discuss below any idealized models. Instead, I turn now to a description of the New York marketplace for wine and the empirical evidence.

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[2] In addressing these issues, it is important to bear in mind that, as I understand it, the Twenty-first Amendment does give states the right to regulate the transportation and importation of wine.

[3] No such model provides an appropriate benchmark in this case. As the authors of one of the best-known textbooks explain in their discussion of the theoretical model of perfect competition, "The perfectly competitive world of the economist is like the frictionless model of the physicist. It is not a picture of the real world we meet when we step outside the library and rub elbows with people on the street." Paul Samuelson and William D. Nordhaus, with the assistance of Michael J. Mandel, *Economics*. 15th ed. (New York: McGraw-Hill, Inc., 1995), pp. 271-272.

IV. Evidence on the Availability of Wine in New York

8. If existing regulations on the distribution of wine effectively restrict out-of-state wineries' ability to sell wine in New York or New York consumers' ability to buy wine produced outside the state, at the outset, I would expect to find that only a small percentage of the total volume of wine sold in New York comes from out-of-state wineries. Moreover, I would not expect to find wine from many different out-of-state wineries available in New York State. In fact, as the evidence below shows, I find quite the opposite: A very substantial proportion of wine sold in New York comes from out of state (see discussion below), and that wine comes from numerous different wineries selling many different brands.

9. The available data demonstrate that out-of-state wine comes from many different sources. To get a sense of the locations of the sources of wine available to New York consumers, I tabulated data on the brands available through wholesalers whose price lists appeared in the April 2001 issue of the Metro New York edition of *Beverage Media*, a monthly trade publication. For wholesalers that choose to list their products in *Beverage Media*,[4] the publication includes price lists for the products that those wholesalers sell to retailers. For wines, *Beverage Media* includes two sources of information: a Brand Index, which lists wine brands by location of the winery, and a separate section that includes price lists for individual distributors ("wholesaler pages"). Although the information in the two sections overlaps, the wholesaler pages include a number

[4] Listings are voluntary.

of brands, often smaller labels, that do not appear in the Brand Index.[5]

10. Exhibit 1 provides summary information on the number of brands available. While *Beverage Media* lists 47 brands from New York wineries, it lists 49 brands from Oregon wineries, 39 brands from Washington State, and over 750 brands available from California wineries, the other main wine-producing states in the US.[6] In addition, the Brand Index alone lists more than 3,600 foreign brands.[7] For many brands, of course, the wineries offer several different types of wine. Needless to say, those numbers suggest that a very wide range of out-of-state wine is available in New York through the existing three-tier system.

11. Moreover, according to *Beverage Media's* Brand Index, the number of out-of-state brands available through New York wholesalers has increased substantially since 1991. Exhibit 2 provides data on the number of brands listed in *Beverage Media's* Brand Index in December 1991, December 1996, and April 2001. Note that the number of

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[5] I understand that the wholesaler pages themselves may not include a complete list of brands available from the distributors. In some cases, apparently, wineries explicitly request that wholesalers *not* list their brands in *Beverage Media*. They may do so in order to increase the cachet of their brands and/or because they produce only a limited volume of wine.

[6] The "Other U.S." wineries listed include Barboursville Vineyards, located in Virginia.

[7] Plaintiffs' expert Hans Stern was not surprised that so many imported brands are available, because "this is the strongest import market in the U.S." He also acknowledged that imported wine goes through the three-tier system. (Deposition of Hans L. Stern, August 2 and 3, 2001 ("Stern Deposition"), p. 62)

California brands increased nearly 50 percent between 1991 and 2001, the numbers of brands available from Oregon and Washington have each more than doubled, and the number of foreign brands has increased nearly 90 percent.

12. In principle, of course, it might be conceivable that those out-of-state brands come from a very limited number of wineries. To address that possibility, Exhibit 3 summarizes information on the number of wineries represented by the brand counts in Exhibit 1. Column (d) in Exhibit 3, which lists the total number of brands available from each indicated location, matches column (c) in Exhibit 1. Columns (a), (b), and (c) of Exhibit 3 provide a breakdown of the totals listed in column (d). For California, for example, Exhibit 3 indicates that the 765 brands came from at least 534 distinct wineries (column (a)). It also shows that 84 California brands (column (b)) listed in *Beverage Media* are "secondary" brands that were produced by the 534 distinct wineries that I identified. For the other 147 brands (column (c)), I was unable to determine whether they were made by one of the 534 wineries tallied in column (a) or by other wineries. The other rows in Exhibit 3 provide analogous data for the other locations. Exhibit 3 shows that wholesale distributors in metropolitan New York offered wines from at least 625 domestic wineries located outside New York – and possibly many more.

13. Note, moreover, that both large and small out-of-state wineries distribute their wine through wholesalers licensed in New York. Exhibit 4 provides estimates, where

available, of the levels of annual production for the out-of-state domestic wineries whose wines are listed in the April 2001 issue of *Beverage Media*.[8] While the list certainly includes the large, well-known wineries – *e.g.*, Sutter Home, Woodbridge, and Paul Masson, each of which produces millions of cases each year – it includes many small wineries as well. The exhibit includes, for example, over 200 wineries with annual production of 10,000 cases or less – and 87 wineries with annual production of 3,000 cases or less.[9]

14. Those numbers (200 and 87), moreover, undoubtedly understate the true number of small wineries represented by New York wholesalers: Note that Exhibit 4 includes several pages of wineries for which I was unable to obtain production estimates. Although some of those wineries may be large, many of them are likely to be quite small. (It is reasonable to assume that production estimates are less likely to be publicly available for small wineries.) Furthermore, *Beverage Media* does not include all licensed wholesalers – and even those wholesalers that are included in *Beverage Media* do not list all wines from all wineries whose wines they distribute. In short, the size distribution of the wineries in Exhibit 4 certainly belies

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[8] As indicated in the exhibit, sources of information for estimates of annual production included several websites, including winetoday.com; websites of the wineries themselves; James Laube, *Wine Spectator's California Wine*, second ed. (New York: Wine Spectator Press, 1999); Stephen Brook, *The Wines of California* (London, New York: Faber and Faber, 1999); and phone calls to individual wineries.

[9] Swedenburg Winery produces "approximately 1,500-2,000 cases" per year. (Affidavit of Juanita Swedenburg, May 22, 2001, ¶ 5) *The Wines of California* estimates Lucas Winery's production at 2,000 cases. (Stephen Brook, *The Wines of California* (London, New York: Faber and Faber, 1999), p. 606)

any claim that New York wholesalers distribute only large wineries' products.[10]

15. It is also interesting to compare the size distribution of wineries in Exhibit 4 to the table entitled "Analysis of California Wine Shipments [in 1996], Arrayed by Winery Size Class," attached to the Matanzas Creek Winery's Statement for the Joint Hearing of the Senate Select Committee on California's Wine Industry and the Assembly Select Committee on California Wine.[11] According to that table, submitted by Plaintiffs, large and medium wineries in California, defined as those that shipped over 100,000 cases in 1996, *were* "adequately served by the three-tier system." Note, incidentally, that those wineries accounted for nearly 96 percent of total California winery shipments.[12] Matanzas Creek's written statement adds that wineries that shipped 50,000-100,000 cases in 1996,

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[10] That, of course, is hardly surprising: The sale of wine is importantly demand – rather than supply-induced; *i.e.*, what matters primarily is not the amount produced but rather the adequacy of demand.

[11] See the Joint Hearing on "The Future of Direct Shipments of Wine," St. Helena, California, November 10, 1997, appended to the Affidavit of Clint Bolick, Volume II of Plaintiff's Notice of Motion and Motion for Summary Judgment.

[12] According to the Winery's written statement, "The fact is 95% of California wine (11,876,000 cases), produced by about 45 wineries is unquestionably shipped to market through the three-tier wholesale system!" That statement reflects an error in reading the table attached to the Winery's statement: The 11,876,000 cases mentioned were the shipments of 43 "medium" wineries that each shipped 100,000 to 1,000,000 cases. It excludes 149,137,000 cases shipped by 15 large wineries that each shipped over 1,000,000 cases. The Winery's written statement about wineries whose wine was unquestionably shipped through the three-tier system, therefore, should refer to nearly 96 percent of California wine (161,013,000 = 149,137,000 + 11,876,000 cases), produced by 58 wineries.

which accounted for another 1.1% of California shipments, were also "arguably" served by the three-tier system. While Matanzas Creek's statement suggests that wineries that shipped less than 50,000 cases were *not* adequately served by the three-tier system, Exhibit 4 shows otherwise: In New York, licensed wholesalers listed in *Beverage Media* carry wines from more than 350 wineries with annual production of less than 50,000 cases – many of which are located in California. Furthermore, many, if not most, of the wineries for which Exhibit 4 lists no production estimate probably also produce less than 50,000 cases per year. In New York, therefore, the three-tier system apparently serves even small wineries quite well.

16. The available evidence also suggests that New York consumers do not suffer from any dearth of out-of-state sources for the major types of wine produced by the plaintiff wineries, Lucas Winery and Swedenburg Winery. Exhibit 5 presents data on the number of wines of six different types produced by those wineries – cabernet sauvignon, pinot noir, zinfandel, chardonnay, riesling, and white zinfandel – that New York consumers could order from eVineyard.com on July 6, 2001.[13] Note that the numbers in Exhibit 5 reflect the number of wines available on one day from only one particular website. They do not include the wines available from the many other websites

[13] eVineyard.com, like other websites that sell wine, requires that the user indicate the state to which the wine will be shipped. As indicated in the attached tables, Exhibits 5-7 include in their tallies of chardonnays, pinot noirs, cabernet sauvignons, and white zinfandels various alternative designations for those types. See Exhibits 5-7 for details.

that sell to consumers – let alone the numerous brick-and-mortar retailers in New York.

17. Nonetheless, it is clear from Exhibit 5 that New York consumers have a considerable number of choices for each of these types of wine from wineries outside New York. The exhibit shows, for example, that New York consumers can choose from more than 150 zinfandels, more than 200 pinot noirs, and over 350 cabernet sauvignons. As the notes to the table indicate, wines of the same brand but different vintage are *not* counted as separate choices. Had they been counted separately, of course, the numbers in Exhibit 5 would be even higher. Note, moreover, that consumers' choices include a wide range of prices for five of the six types; the one exception, of course, is white zinfandel, an inherently inexpensive wine. (Even for white zinfandels, consumers can choose among 17 out-of-state wines.)

18. Exhibits 6 and 7 provide another perspective on the availability of the six main wine types considered in Exhibit 5. For each of those wine types, Exhibit 6 shows the number of wines available through Peerless and Charmer, according to *Beverage Media*; Exhibit 7, the number of wines available through New York wholesalers that are *not* listed in *Beverage Media*. Exhibit 7 relies on the March 2001 price postings that wholesalers file with the state. Both exhibits convey the same message: New York wholesalers offer a plethora of choices for each of the six wine types.

19. To summarize, the data in Exhibits 1-6 provide considerable evidence that the three-tier distribution system and New York's ban on direct shipments from out-of-state wineries have had little effect, if any, on (1) out-of-state

wineries' ability to sell wine in New York or (2) New York consumers' ability to buy wine from out-of-state wineries.[14]

20. The large number of wineries of all sizes that sell wine through wholesalers in New York belie any claim that the existing legal structure imposes effective obstacles to the sale of wine by out-of-state wineries. In retrospect, of course, that is hardly surprising: After all, New York law does not prohibit wine sales by out-of-state wineries; it simply prohibits one particular channel of distribution by such wineries – a channel that may not, in fact, be particularly efficient for most of those wineries. (I return to this point below.)

21. Out-of-state wineries can and do sell to New York retailers through wholesale distributors, as do many New York wineries as well.[15] Moreover, there are no

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[14] Plaintiff's expert John Dyson apparently agrees. "We [New York wineries] have nothing to fear from greater ease of entry into the New York market. Abundant competition already exists." (Affidavit of John Dyson, May 24, 2001 ("Dyson Affidavit"),¶ 27) Plaintiffs' expert Hans Stern also addressed the likely effects of allowing direct shipping:

> Q: And it's unlikely, as a matter of fact, it's virtually impossible to conceive that the flow of goods will be any different in that . . . there will be less New York wines sold in New York than there already is?
>
> . . .
>
> A: Probably true. Again, no absolutes.
>
> (Stern Deposition, pp. 206-207)

[15] At least 28 wineries produced the 45 New York brands listed in the Brand Index of the April 2001 issue of *Beverage Media*. (I was unable to determine which wineries produced 17 of the New York brands that are listed.) At his deposition, Plaintiffs' expert John Dyson agreed that "probably" half of the wineries in New York State use wholesale distributors to distribute their wine in New York State. (Deposition of John Dyson, August 1, 2001 ("Dyson Deposition"), p. 27) About a month ago, Mr. Dyson's Millbrook (NY) Winery entered into an

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effective obstacles to entry into wholesale distribution. A one-year wholesale wine license costs $1,075, with a surety bond of $10,000, and the wholesaler must satisfy a few other basic requirements.[16] In fact, Plaintiffs' expert John Dyson, who owns a majority interest in an Italian winery, also owns a majority interest in Pebble Ridge Vineyard, a licensed New York wholesaler that distributes his Italian wine.[17] At his deposition, Mr. Dyson testified that it cost "probable [sic] a few to maybe $10,000, counting the legal fees," to obtain the wholesale license, and only a few hundred dollars per year to renew the license.[18]

22. I am advised that nothing prevents an out-of-state winery from obtaining such a license.[19] Indeed, if a

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agreement with Colony, a New York wholesaler, to distribute their wines in all parts of New York State outside New York City, Long Island, and Westchester and Dutchess Counties. (Dyson Deposition, pp. 27-33)

[16] A wholesale licensee must, for example, have an office in New York State with an employee present during regular business hours, and must keep books and records on the licensed premises available for inspection during regular business hours. See http://www.abc.state.ny.us/faq.html for further details.

[17] Dyson Deposition, pp. 75-76.

[18] Dyson Deposition, pp. 76-77. Mr. Dyson also owns majority interests in wineries in New York (Millbrook Winery) and California (Williams and Selyem). Mr. Dyson described yet another way that wine produced outside New York State is distributed in New York: "Millbrook asked Williams and Selyem under a contractual arrangement to make wine to its standards and that wine is then shipped winery to winery and then distributed by Millbrook winery in the State of New York." (Dyson Deposition, p. 71)

[19] Plaintiff's expert John Dyson said he was not aware of anything that restricts an out-of-state winery from obtaining a wholesale wine license in New York. (Dyson Deposition, pp. 90 and 95) Plaintiff's expert Hans Stern, when asked to assume that an out-of-state winery could obtain a wholesale wine license in New York, said, "I think it's a

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winery or wineries believe they can sell any appreciable amount of wine in New York State *and* believe they can distribute it at substantially lower cost than existing wholesalers, the requirements to become a wholesale distributor are not so burdensome that they constitute an economic impediment.[20]

23. Of course, with over 200 wholesale licensees in New York State already, there is every reason to believe that competition helps keep distribution costs near their minimum[21] – and not only for larger brands. Indeed, the testimony of Plaintiffs' expert Hans Stern casts doubt on claims that smaller brands in particular lack wholesale distribution in New York: In discussing why he expects the wholesale market for wine to be more fragmented than the wholesale market for spirits, he explained: "Because the need to serve Metro New York, which is a heavy wine consuming market and *it's a lot of little guys with some*

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premise that's invalid." To the extent that his opinion is premised on an out-of-state winery's inability to obtain such a license, if that premise were wrong, he would "want to rethink" his opinion. (Stern Deposition, pp. 223-225) I understand that out-of-state wineries may also obtain a New York winery license as long as they maintain an office in New York and establish a "storage or warehouse" facility in the state to house their product for distribution here. For purposes of my opinion, however, I have not relied on any such ability. If out-of-state wineries can indeed get a New York winery license, that simply lends further support to the opinion I have already formulated: that New York affords out-of-state wineries ample opportunity to distribute their product and presents no barrier to entry here.

[20] As I understand it, for example, nothing prevents Lucas Winery, on its own or together with other wineries in the Lodi region, from obtaining a wholesale license in New York.

[21] See section VI.B.1 below for further discussion of the number of New York wholesalers.

smaller brands that do a pretty good job in New York in certain keys accounts, important accounts."[22]

24. As the exhibits discussed above also demonstrate, the three-tier structure and the ban on direct shipments from out of state do not constrain New York consumers' choices. With consumers enjoying the opportunity to choose wines from hundreds of out-of-state wineries, including numerous wines at virtually every price point for every major type of wine offered by the plaintiff

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[22] Stern Deposition, p. 105, emphasis added. In other testimony, Mr. Stern suggested that small producers might deliberately seek out small wine distributors:

> A: If I can only produce 5,000 cases, whatever the number, I want to be doggone sure that it doesn't go to some liquor store in Long Island. I want to focus my super premium $125 bottle of wine in restaurants and wine shops that cater to people who can afford $125 wine.
>
> . . .
>
> Q: It would be more likely that you would choose one of the boutique wine [distributors] –
>
> A: I probably would for this itty bitty winery, yes.
>
> . . .
>
> Q: The smaller wineries would tend to pick the boutiques if they have the quality wines?
>
> A: If they're paying at that price point, yeah.
>
> Q: The larger wineries would tend to sell through the larger wholesaler?
>
> A: Yeah.
>
> (Stern Deposition, pp. 115-116)

Later in his deposition, Mr. Stern returned to that point:

> Q: For the premium winery he wouldn't be looking for full market coverage, he's looking for the specialist, if he's a small winery, isn't that right?
>
> A: If he's smart, yeah.
>
> (Stern Deposition, p. 121)

wineries – as well as other types of wines, both domestic and foreign – it is clear that the existing legal restrictions cannot and do not act to reduce consumers' welfare to any noticeable degree.

25. Moreover, the evidence demonstrates clearly that New York's legal structure not distinguish out-of-state wineries in a way that protects in-state wineries from competition they might otherwise face. With hundreds of out-of-state wineries, including many small ones, selling wines in New York at all price points, the State's regulations obviously erect no obstacles to competition by out-of-state wineries with New York wineries.

26. Indeed, most of the wines produced by in-state wineries do not compete with those of out-of-state wineries that would like to ship directly to New York State consumers. Note, for example, that only a relatively small proportion of wine produced in New York is actually consumed in New York. In 1997, for example, New York wineries exported 86 percent of the 31,733,000 gallons (13,347,000 nine-liter case equivalents) of wine they produced to foreign countries or other states; only 14 percent (1,869,000 nine-liter case equivalents) was sold in New York.[23] That year, according to MKF WineStats, total wine consumption in New York was 17,447,000 nine-liter case equivalents.[24] In 1997, therefore, sales of wine produced by New York

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[23] *1998 Survey of New York Wineries*, New York Agricultural Statistics Service, available at www.nass.usda.gov/ny/bulletin/Winery/winery.htm, tables entitled "Wine Production and Capacity, By Wine Trail" and "Percent of Wine Sales by Location, Wine Trail, & Year."

[24] "1998 U.S. Wine Report," MKF WineStats (St. Helena, California: Motto Kryla & Fisher LLP, 1999). Section 3-33.

wineries amounted to less than 11 percent of New York wine consumption.[25]

27. Furthermore, table wine, which the plaintiff wineries produce,[26] accounted for only 35 percent of the total gallonage of wine produced by New York wineries in 1997. Fortified wine accounted for more than half of New York wineries' production, with sparkling wines, specialty wines, and dessert wines (none of which competes with Plaintiff wineries' wines) accounting for the rest.[27] Therefore, even

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[25] Data provided by Plaintiffs' expert Robert Eyler suggest that the percentage may be even lower than 11 percent. According to Dr. Eyler, New York State produces roughly 4% of total US production. (Eyler Affidavit,¶ 7, and Deposition of Robert Eyler, June 14 and 15, 2001 ("Eyler Deposition"), p. 227). If New York exports 86 percent of its production to foreign countries or other states, only 14% of New York's production – *i.e.*, 0.56% = 14% of 4% of total US production – remains in New York. Dr. Eyler also reports that New York consumption was 8.3% of US consumption in 1998. (Eyler Affidavit,¶ 7) If total US production is roughly equal to total US consumption, therefore, New York's production of wine accounts for roughly 6.7% (0.56%/8.3%) of New York's wine consumption. (In 1997, US wine production (533 million gallons) was a bit higher than US wine consumption (520 million gallons); in 1998, US wine production (494 million gallons) was a bit lower than US wine consumption (526 million gallons). Source: www.wineinstitute.org, citing Wine Institute/US WineStats from BATF data and Wine Institute/Gomberg, Fredrikson & Associates)

[26] Documents produced by Lucas Winery include small sales of "L.H." and "V.G." wine, in addition to zinfandel and chardonnay, which account for the bulk of his sales. I have not found definitions of either abbreviation in the documents produced by Lucas Winery.

[27] *1998 Survey of New York Wineries, op. cit.*, table entitled "Wine Production, by Year and Type." More recently, New York producers have contributed to the growth of another category of wine that does not overlap with the type produced by the plaintiff wineries: "Another growth area in 1999 was sweet, low-alcohol 'flavored wine.' Total shipments reached an estimated 6 million cases in 1999, with approximately 60 percent of this total produced in New York State. Most of this growth occurred under Canandaigua's Arbor Mist brand in 1998-99."

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the 11 percent and 6.7 percent figures overstate the percentage of New York State wine consumption in 1997 accounted for by table wine produced in New York.

28. Note also that most New York wineries apparently ship only small proportions of their wine directly to New York consumers. A 1998 survey of New York wineries' sales in 1997 asked wineries to divide their sales into four types: (i) direct to consumers at the winery; (ii) direct to restaurants and liquor stores; (iii) through a New York distributor; and (iv) Other, which includes both shipments to out-of-state customers and direct shipments to New York consumers.[28] In all but one of the New York producing regions considered, the first three types of sales accounted for at least 96 percent of sales by volume and at least 98 percent of sales dollars. As might be expected, a substantial fraction of sales by wineries in those regions were made at the wineries themselves – sales that would not compete directly with direct shipments to consumers by out-of-state wineries.[29]

("U.S. Wine Demographics Report," St. Helena, California: Motto Kryla & Fisher LLP, 2000, p. 13)

[28] Survey questionnaire, Section 5, for *1998 Survey of New York Wineries*, New York Agricultural Statistics Service. The table summarizing responses to that question, "Percent of Total Wine Sales and Dollars by Type of Sale by Region, 1997," lists the first type of sale as "Direct to Consumer." (*1998 Survey of New York Wineries*, New York Agricultural Statistics Service, available at www.nass.usda.gov/nyl bulletin/Winery/winery.htm) It is clear from the survey questionnaire itself, however, that that type includes only direct sales to consumers *at the winery*. (See question 4 in Section 5 of the survey questionnaire.) I have also verified that, as well as the other definitions, with State Statistician Stephen Ropel.

[29] In one BATF region, the "Finger Lakes" region, 87% of sales by volume and 83% of dollar sales were classified as "Other," the category

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29. Finally, there is no sense in which the three-tier system protects New York wholesalers from competition. There simply is no basis, for example, for Plaintiffs' expert Robert Eyler's reference to "the distributor's monopolistic filter."[30] Without barriers to entry into wholesale distribution – and with numerous wholesale distributors competing with each other – the term "monopoly" is a misnomer. The state's regulations regarding wine distribution certainly do not protect distributors from competition.

V. Economic Incentives in the Wine Industry

In this section, I briefly discuss some of the economic incentives of the various participants in the wine industry. Those incentives help shed light on why the industry's participants do business as they do, why New York's

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that includes sales to out-of-state customers and direct shipments to New York consumers. It is clear, however, from other reported survey results, that sales to out-of-state customers – not direct shipments to New York consumers – accounted for the bulk of those sales. Based on data reported for the state as a whole, the "Finger Lakes" BATF region accounted for the bulk of total state sales. Another table in the survey reports "Percent of Wine Sales by Location, Wine Trail, & Year" for the following wine trails: Long Island, Shawangunk, Dutchess, Cayuga, Seneca Lake, Keuka Lake, and None; *i.e.*, it reports data by wine trail rather than by BATF region. That table groups sales by three locations: New York, Other States, and Other Countries. In that table, wineries in the "None" category (not on one of the listed wine trails) accounted for the bulk of total state sales. (See the table entitled "Wine Production and Capacity, by Wine Trail, which shows that wineries in that group produced 30,426,000 gallons, representing nearly 96% of the state's total production.) Thus there is considerable overlap between the "Finger Lakes" BATF region and the wineries that were not located on any of the listed wine trails. According to the survey, wineries that were not on any of the listed wine trails sold only 11% of their wine in New York; the other 89% was sold in other states or countries.

[30] Eyler Affidavit, ¶ 15.

regulations do not effectively restrict either New York wine consumers or out-of-state wineries, and why the ban on out-of-state direct shipments helps serve the legitimate interests of the state.

A. The Incentives to Sell Wine Through Wholesale Distributors

31. Wholesale wine distributors perform many useful functions for wineries and retailers. Among other services, wholesalers pay the freight charge for delivery of the wine to the wholesalers' local warehouses, where wine can be stored for next-day or same-day delivery to retailers; maintain contacts and create personal relationships with retailers that help promote sales; create signs and displays for retailers; coordinate wine tastings and other promotional events; and collect payments from retailers, taking the credit risk on bad retailer debt. (As I understand it, wholesalers pay wineries for the wine; they do not take the wine on consignment. As a consequence, wineries get their money upfront, before the actual sale to retailers.)

32. In addition, wholesalers pick, pack, and load goods for delivery from their warehouses to retailers; deliver wine to retailers from their warehouses; and often allow retailers to buy split cases so that they can order small quantities of wine. I also understand that wholesalers handle collection of New York's excise tax on wine gallonage, providing a service to both the state and wineries. Wholesalers also help the state monitor the flow and distribution of alcohol within the state, make sure that

wines are properly labeled, and ensure that they deliver wines only to retailers with current and valid licenses.[31]

33. In light of the many services wholesalers provide, it is reasonable to assume that many wineries – both in- and out-of-state – have an incentive to distribute wine through New York wholesalers.[32] As the exhibits mentioned above demonstrate, wineries of all sizes do in fact distribute wine successfully in New York this way.

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[31] Declaration of James Chatfield, August 15, 2001. See also Plaintiff's expert John Dyson's descriptions of services provided by wholesalers with which his wineries have contractual relationships: "They go with a representative of the winery to call on restaurants and retail stores in their respective jurisdictions. In a modest degree they do it on their own, without somebody from the winery having to be there. They take the order, they deliver the wine to the purchaser, and they bill the purchaser. They also store a modest quantity of wine within their state,. . . ." The wholesalers also ensure that excise taxes are paid to the states that require them and bear the costs of storage in their warehouses and local distribution within their jurisdictions. (Dyson Deposition, pp. 128-131)

[32] At his deposition, plaintiffs' expert Hans Stern also identified a fourth tier, marketers, in which he included Brown-Forman, for which he had previously worked. (Stern Deposition, p. 86) Marketers help wineries market and distribute their wine. Discussing the role of Brown-Forman, Mr. Stern said: "Not sure of the definition of middle man, but we took title to the product. Value we added was our salts and distribution and our marketing clout and the back room." Asked to explain "back room," he added: "Bill and pay. Getting legal clearance. We kept small inventory in the field, inventory product. Some we shipped directly from producer to wholesaler. But some, for smaller markets, we inventoried ourselves in ware-houses." (Stern Deposition, pp. 22-23) See also Stern Deposition, pp. 83-84, for Mr. Stern's discussion of the mutual benefits that a winery and marketer enjoy, and pp. 95-96 for his further discussion of the value added by a marketer in helping a winery market a brand.

B. Wholesalers' Incentives to Distribute Wines

As specialists in the logistics of wine distribution, wholesale distributors have considerable expertise in the transportation, marketing, and distribution of wine. Having expended the fixed costs of establishing their distribution network, wholesalers have considerable incentives to maximize the use of their network by maximizing the amount of wine distributed, regardless of the identity, size, or location of the winery. Thus it is hardly surprising to find that wholesalers carry wines from wineries from a variety of locations, many with very small levels of production (see, *e.g.*, Exhibit 4). I understand from personnel at Peerless, for example, that there is no minimum winery size below which they will refuse to carry the winery's products. As long as there is reason to believe that there is adequate demand for a wine from ultimate consumers, Peerless and other distributors have strong incentives to spread their fixed costs by carrying the wine.

35. To be sure, wineries, however large or small they may be, must give wholesalers reason to believe that there *is* a demand for their wine. Indeed, Plaintiffs' expert Robert Eyler himself suggested at his deposition that "if you are trying to compete, the perceived quality of the wine is key."[33] Elsewhere he states,

> How important are these reviews to the consumer? For California wineries, it [sic] seems to be the key for demand. Small quantities can be sold out in one day based on a single review. . . . These tasting scores act as barriers to

[33] Eyler Deposition, pp. 101-102.

> competition, and these barriers are key assets of US wineries.
>
> . . .
>
> The perceived quality of wine is, from an economic standpoint, the market fulcrum: A wine's tasting scores in key US publications determine, in many cases, the viability of the vintage and (in extreme cases) the brand. . . . a lack of quality is directly related to a lack of sales.
>
> . . .
>
> One of the most unfortunate, and most intriguing, aspects of the US wine industry is its dependence on tasting scores for demand. Like no other industry, quality seems to drive demand.[34]

At his deposition, Dr. Eyler elaborated on this theme:

> If I was running a business and I got a 92 in the Wine Spectator, I would slap it all over to make sure every consumer could see it.[35]
>
> At wineries I've worked at, for example, if the Wine Spectator comes out with a 90 or above score, they could in fact sell the entire lot of that winery out within a few days.[36]

36. Other Plaintiffs' experts apparently agree. Mr. Dyson, who owns majority interests in three different wineries, agreed that it is important to get good ratings in

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[34] Robert C. Eyler, "The International Competitiveness of the California Wine Industry," available at http://libweb.sonoa.edu/regional/faculty/eyler/eyler.html.

[35] Eyler Deposition, p. 108.

[36] Eyler Deposition, p. 110.

tests like those in *Wine Spectator* because "[i]t stimulates interest on the part of . . . the customer, to actually buy the wine from either us or somebody, down the chain, who then buys eventually from us."[37] Similarly, Mr. Stern testified that "[g]ood tasting scores will sell the product" while poor tasting scores will make it "very difficult" to sell, that "[t]here is a strong correlation" between tasting scores and quality, and that it "would make life damn hard" to try to sell wine as a premium product if it had a low tasting score.[38] Asked what a good tasting score is, Mr. Stern said he would be "happy [with] anything above 90."[39] Mr. Stern also indicated that highly rated wines, including ones produced by small wineries, do not have difficulty getting access to distribution by New York wholesalers:

> Q: Now, you don't know of any wine, however, that's ever received a 93 that hasn't been able to find access to the market through the wholesale system in New York?
>
> A: That's true.
>
> Q: In fact, for the small winery, there are wholesalers that are particularly well-suited to do that, these boutique wholesalers you mentioned?
>
> . . .
>
> A: Yeah.
>
> Q: In fact, that's what they specialize in?
>
> A: Uh-hum.[40]

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[37] Dyson Deposition, pp. 185-186.

[38] Stern Deposition, pp. 126-128.

[39] Stern Deposition, p. 126.

[40] Stern Deposition, pp. 160-161.

37. In short, a winery that successfully distinguishes its product and earns high tasting scores in major wine publications will give wholesalers every incentive to carry its products; high tasting scores can facilitate entry.[41] Plaintiff's expert Hans Stern addressed this issue at his deposition:

> Q: If you were representing a small winery and wanted to develop a reputation for quality is one of the things you would do is subject that wine to a tasting test?
>
> A: If I was damn sure that I had the best wine I could possibly make, yes.[42]

A winery that fails to earn high tasting scores and make sufficient efforts to distinguish its product may effectively erect barriers to its own entry or expansion.

38. Indeed, the plaintiff wineries may suffer from precisely such problems, rather than any "discrimination" allegedly created by New York's ban on direct shipments. In a response to a request for information from counsel for Peerless, for example, Clint Bolick, Vice President and Director of Litigation for the Institute of Justice, replies:

> The Lucas Winery has not received any awards or ratings. (Mr. Lucas questions the value and

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[41] Note, incidentally, that Dr. Eyler's comments may also explain why there aren't even more out-of-state wineries distributing wine through New York wholesalers: Demand may be so strong, in part because of their successful attempts to differentiate their wines and earn high tasting scores or awards, that they have no need or desire to sell to New York consumers; they can sell out quickly in their own state or locality.

[42] Stern Deposition, p. 221.

objectivity of these sorts of measures and does not enter his wines in competitions.)[43]

There are, in fact; numerous other sources of zinfandel that *have* been recognized. A compilation of the "Best U.S. Zinfandel Producers" by the Beverage Testing Institute for example, listed more than 100 producers; the Lucas Winery does not appear on the list.[44,45] Similarly, in two years worth

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[43] Clint Bolick, Vice President and Director of Litigation for the Institute for Justice, Response to Request 2, letter to Randy Mastro, Esq., April 26, 2001. Note also the review on winetoday.com of Lucas winery's 1998 Chardonnay, which described its aromas as "dried fruit, toast" and listed "bitter, hot impression from alcohol, ripe, slightly bitter, ultra-ripe" under Other Descriptors. (www.winetoday.com/reviews/index.html) In fact, Mr. Lucas also seems to have made a deliberate *choice* not to use a wholesaler and not to expend substantial resources in marketing his products: "The Lucas Winery does not have a New York wholesaler because it is costly and time consuming both to the wholesaler and to myself. I am not large enough to warrant the attention that a large winery receives from a wholesaler, cannot support the advertising, a winery representative, or the expense to personally visit the New York marketplace. *This is a choice I have made* as part of my business strategy in identifying my niche or place in the marketing of my wines." (Affidavit of David Lucas, ¶ 5. emphasis added) According to a 1996 article, "He [Lucas] admits that acceptance of his wines is more important to him than profits." (Bill Cook, "A Vintner's Avocation: One-Man Winery is One of Few in County," *The [Stockton, CA] Record*, August 19, 1996, p. D1.) Indeed, "[h]is day job involves working for the grower relations department of Mondavi Woodbridge." (Stephen Brook, *The Wines of California* (London, New York: Faber and Faber, 1999), p. 606)

[44] The list divides the producers into three categories: (i) 15 "Premier U.S. Zinfandel Producers," (ii) 38 "Great U.S. Zinfandel Producers," and (iii) 51 "Dependable U.S. Zinfandel Producers." (*The Beverage Testing Institute's Buying Guide to Wines of North America*, edited by Charles Laverick (New York: Sterling Publishing Co., Inc., 1999))

[45] Note also that grapes from the Lodi region, in which Lucas Winery is located, typically fetch relatively low prices compared to grapes from other regions in California, as Exhibit 8 shows.

of reviews downloaded from Winespectator.com in April, 2001, none of Swedenburg Winery's wines even appear, let alone earn a high rating.[46]

C. The State's Incentives to Ban Direct Shipments from Out-of-State Wineries

39. When confronted by regulations (regarding tax payments, sales to minors, or any other legitimate concerns of a state), wineries, like all other firms, are likely to consider their incentives to comply. Those incentives depend on, among other things, the costs and benefits of compliance, the probability of being caught if they do not comply, and the likely cost of non-compliance if they are caught. Since compliance imposes costs on wineries, other things equal they have an incentive to minimize those

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[46] While Swedenburg claims to " . . . have received over 200 awards at international wine competitions . . ."(Clint Bolick, Vice President and Director of Litigation for the Institute of Justice, Response to Request 2, letter to Randy Mastro, Esq., April 26, 2001), the nature and level of those awards and competitions are not specified, nor are the other wines that were entered. Indeed, if the reference to an award from the "Beverage Tasting-Institute" actually refers to the Beverage Testing Institute, note that the Beverage Testing institutes *Buying Guide to Wines of North America* rates one wine produced by Swedenburg Winery: its rating of Swedenburg's 1995 Cabernet Sauvignon is 80. The *Buying Guide's* rating scale includes *Superlative* (96-100), *Exceptional* (90-95), *Highly Recommended* (85-89), *Recommended* (80-84), and *Not Recommended* (under 80). (*The Beverage Testing Institute's Buying Guide to Wines of North America*, edited by Charles Laverick (New York; Sterling Publishing Co., Inc., 1999), pp. 13 and 304.) In addition, the web site of the *Journal of the Beverage Testing Institute* lists a Swedenburg 1999 Great Falls Vineyard, Vidal with a rating of 83. (www.tastings.com/search_wine.lasso)

costs by complying only to the extent they believe is necessary.[47]

40. Needless to say, not all wineries comply voluntarily. Consider, for example. Mr. Lucas' description of his operations when he began making wine:

> I made about 600 gallons of zinfandel a year. I would sell it to my friends for $1 a bottle or trade it for some figs. One day, a gray car pulled up and a gray man with a gray suit and a gray attitude got out. He was from the Bureau of Alcohol, Tobacco and Firearms.
>
> You can only bottle 200 gallons of wine for your own use without becoming a bona fide winery, so I became official on that day.[48]

41. Similarly, the following exchange from the deposition of Plaintiffs' expert John Dyson casts doubt on the notion that wineries will comply either readily or voluntarily with state laws:

> Q: Before the sting operation that you described that State Attorneys' [sic] General office, including New York's, conducted in the late '90s, did Millbrook ever ship directly to

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[47] Plaintiffs' expert John Dyson states, "If other out-of-state wineries were allowed to ship to New York, they easily *could* abide [by] the same requirements that New York wineries must follow in shipping directly to retailers and other consumers within New York." (Dyson Affidavit, ¶ 26, emphasis added) The relevant question is not whether they *could* do so, but whether they *would* do so, especially in light of New York's costs of monitoring, policing, and enforcing compliance of thousands of out-of-state wineries, as well as the probability of detection.

[48] Bill Cook, "A Vintner's Avocation: One-Man Winery is One of Few in County," *The [Stockton. CA] Record*, August 19, 1996, p. D1.

consumers in other states even though that violated those state's [sic] laws?

A: We shipped to other states because it was permitted by New York State law. *We didn't really investigate what the other states were involved with.*

. . .

Q: And you made direct shipments to some such states even though they had requirements of distribution through licensed wholesalers in the states; correct?

A: *We didn't investigate what their particular laws were one way or the other* and none of them has ever sanction[ed] us, as I have already testified.[49]

42. All else equal, an out-of-state winery that fails to comply with regulations is less likely to be detected than an in-state winery.[50] Similarly, since the state's difficulty and costs of enforcing compliance are likely to be higher for an out-of-state winery, an out-of-state winery's likely

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[49] Dyson Deposition, pp. 125-126 (emphasis added).

[50] As noted in the text above, Plaintiffs' expert John Dyson testified at his deposition that his Millbrook Winery made direct shipments to other states without investigating their particular laws "one way or the other." That discussion also provides insight on states' ability to detect violations of their laws:

Q: Were there any complaints of you?

A: No.

Q: How would they [other states] have even known that you were direct shipping?

A: I couldn't tell you, Counselor.

(Dyson Deposition, p. 126)

cost, even if caught, is lower than the likely cost for an in-state winery. For both reasons, an out-of-state winery has less incentive to comply with New York State regulations than does an in-state winery.[51]

43. The state, therefore, has understandable incentives to impose different regulations on in-state and out-of-state wineries.[52] In this industry, with literally thousands of out-of-state wineries and fewer than 200 wineries in New York, the state's incentives to impose tighter regulation on out-of-state wineries are that much greater. Given the wineries' and the state's incentives, therefore, it is neither surprising nor unreasonable that New York State requires out-of-state wineries to distribute. their wines through licensed New York wholesalers.[53]

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[51] At the margin, an out-of-state winery's incentives to comply may be lower for another reason as well. To the extent that non-compliance imposes negative externalities on others – injuries or fatalities caused by sales to underage consumers who drink and drive, for example – the winery is less likely to bear the cost of the externality than is an in-state winery. Moreover, the out-of-state winery may be less likely to suffer reputational damage if such accidents occur. Moreover, other things equal, the smaller a winery's shipments are, the lower the probability (a) that any cheating will be detected and (b) that New York (or, for that matter, any local jurisdiction) would incur the costs to detect or prosecute any violation. As a consequence, those wineries' incentives to comply are likely to be even lower.

[52] The state's costs of enforcement and compliance differ for in-state and out-of-state wineries, so it is quite logical for the state to impose different regulations.

[53] In this respect, the rise of the Internet has, if anything, increased the state's cost of monitoring and policing, since web-based transactions are typically less transparent.

VI. Dr. Robert Eyler's Affidavit

44. Counsel for Defendants have also asked me to evaluate various issues raised in the affidavit of Dr. Robert Eyler. In this section, I consider three parts of Dr. Eyler's analysis: (i) his theoretical model, through which he claims to show that New York's ban on direct shipping "reduces the competitive forces in the New York market, thus raising price and lowering welfare;"[54] (ii) his claim that "[o]ut-of-state wines . . . must pass through the distributor's monopolistic filter, which artificially restricts entry to certain out-of-state firms;"[55] and (iii) his Tables 1-3 and the associated discussion, in which he compares wine prices in New York to those in various others states.

A. Dr. Eyler's Theoretical Model

45. In sections II and III of his affidavit, Dr, Eyler discusses "The Economics of Direct Shipping as Free Trade" and "The Economies of Non-Tariff Barriers to Trade." Those sections, he suggests, help "demonstrate that the direct shipping law leads to a second-best outcome than observed [sic] under free trade and should be repealed."[56] In fact, Dr. Eyler's *theoretical* discussion is just that: By ignoring potentially important real-world aspects of the wine industry, he virtually guarantees the conclusion he hopes to reach. Indeed, by adopting simplistic assumptions about

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[54] Eyler Affidavit, ¶ 16.

[55] Eyler Affidavit, ¶ 15.

[56] Eyler Affidavit, ¶ 11. As noted below, in light of the externalities generated by wine consumption, the wine market is one in which a completely free market would yield suboptimal results. Hence Dr. Eyler's suggestion, that repealing the direct shipping law would improve welfare, does not follow.

the industry, he ignores well-established principles of economic theory that undermine his conclusions.

46. Ultimately, Dr. Eyler's argument hinges on the benefits of free trade and his claim that any intervention necessarily reduces societal welfare. He states, for example,

> Free trade is at the foundation of any capitalist nation. Adam Smith's 'Invisible Hand' idea is the beginning of competition in economics, an idea that individual incentives on the part of both consumers and firms drive society . . . to a first-best outcome in terms of benefits derived from exchange. If allowed to act free of governmental intervention and monopolization of the good's supply, markets are allocatively efficient by maximizing societal welfare.[57]

47. Although Adam Smith's discussion of the invisible hand in 1776[58] may be "the beginning of competition in economics," it is certainly not the last word on the subject in the last 225 years. Any reputable, introductory textbook discusses the caveats and limitations of claims about the benefits of completely free trade. Consider, for example, the following excerpt from Samuelson and Nordhaus' *Economics*:

> Smith's insight about the functioning of the market mechanism has inspired modern economists – both the admirers and the critics of capitalism. After two more centuries of experience and

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[57] Eyler Affidavit, ¶ 5. See also similar statements about the benefits of free trade in Eyler Affidavit, ¶ 6, and Deposition of Robert Eyler, June 14 and 15, 2001 ("Eyler Deposition"), p. 10.

[58] Adam Smith; *The Wealth of Nations* (1776).

> thought, however, we recognize the scope and realistic limitations of this doctrine. We know that the market sometimes lets us down, that there are 'market failures,' and that markets do not always lead to the most efficient outcome. One set of market failures concerns monopolies and other forms of imperfect competition. A second failure of the invisible hand comes when there are spillovers or externalities outside the market-place – positive externalities such as scientific discoveries and negative spillovers such as pollution. . . .[59]

48. Social losses from monopoly, of course, underlie the antitrust laws of the US and similar competition statutes of other countries. Dr. Eyler certainly recognizes that the presence of a monopoly violates the conditions needed to invoke Adam Smith's doctrine of the invisible hand. In fact, he assumes, without any basis, that wholesale distribution of wine in New York is monopolized – an issue to which I turn in the next section.

49. On the other hand, Dr. Eyler does not even mention externalities in his affidavit. While economists

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[59] Paul Samuelson and William D. Nordhaus, with the assistance of Michael J. Mandel, *Economics*. 15th ed. (New York: McGraw-Hill, Inc., 1995), p. 27. In 1970, Professor Samuelson became the first American to win the Nobel Prize in economics; the prize was first awarded in 1969. Professor Nordhaus has been a Full Professor of economics at Yale University since 1973. He is a member of the National Academy of Sciences and a Fellow of the American Academy of Arts and Sciences, was a member of the U.S. President's Council of Economic Advisers, and has served as Provost (1986-1988) and Vice President for Finance and Administration (1992-1993) of Yale University. Among his many other honors and affiliations, Professor Nordhaus is also a member of the research staff of the Cowles Foundation and of the National Bureau of Economic Research. (www.econ.yale.edu/~nordhaus/homepage/homepage.htm)

have written numerous articles about various aspects of externalities and their regulation, the essence of the problem is straightforward: When there are "spillovers or externalities outside the marketplace," market prices do not reflect all of the costs or benefits of market participants. A factory that freely pollutes the water in a river downstream takes no account of its actions and the costs it imposes on others. Since the free market does not "charge" either the firm or its customers for those costs – the firm doesn't pay for cleaning up the river, and the prices paid by consumers do not reflect the damage to the environment – the firm's output exceeds the socially optimal level. In that case, the unregulated market fails; hence the term "market failures," alluded to in the quotation above.

50. In explaining how and why free markets may fail, Samuelson and Nordhaus elaborate on externalities:

> A second type of inefficiency arises when there are spill-overs or externalities which involve involuntary exchanges of costs or benefits. Market transactions involve voluntary exchange in which people exchange goods or services for money. . . .
>
> But many interactions take place outside markets. While airports produce a lot of noise, they generally do not pay the people living around the airport for the use of the airspace above their homes. . . .
>
> Externalities (or spillover effects) occur when firms or people impose costs or benefits on others outside the marketplace.
>
> Governments are today often more concerned with negative externalities than positive ones. As our society has become more densely populated

> and as the volume of production of energy, chemicals, and other materials increases, negative externalities or spillover effects have grown from little nuisances into major threats. This is where governments come in. Government *regulations* are designed to control externalities like air and water pollution, strip mining, hazardous wastes, unsafe drugs and foods, and radioactive materials.
>
> . . . Finding the exactly correct regulations is a difficult task, requiring complex science and economics, and subject to heavy political pressure, but few today would argue for returning to the unregulated economic jungle where only might makes right.[60]

51. Although Dr. Eyler does not mention externalities anywhere in his affidavit, he did agree at his deposition that the appropriateness of government intervention to deal with externalities depends on the sum of positive and negative externalities.[61] He also acknowledged that "[I]n a practical sense, I'm sure there are a myriad of problems, but I couldn't articulate any of them to you in an expert way."[62] But instead of considering what those externalities might be, Dr. Eyler simply *assumed* that they sum to zero:

> Q: Did you think you would have to consider externalities as part of your analysis?
>
> A: Not when I started with a competitive equilibrium, no, because in a competitive

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[60] Samuelson and Northam, *op. cit.*, p. 32.

[61] Eyler Deposition, pp. 44-45.

[62] Eyler Deposition, p. 31.

equilibrium there are no externalities by assumption, the market takes in all benefits and costs to the society at one time.

Q: You assumed there were no externalities at all when you did this market analysis?

A: I *assumed* the positive and negative externalities net to zero.

Q: To reach that equation, did you try to assess what the positive and negative externalities were?

A: No, that's beyond the scope of my knowledge.

Q: So you didn't even consider any particular externality in what the societal cost would be?

A: No.

. . .

A: I *assumed* the positive and negative externalities, if they existed, would net out to zero.[63]

Dr. Eyler reiterated that assumption at several other points in his deposition.[64] At one point, for example, he stated that he "started with the idea that any positive or negative I could not quantify as an economist there on the

[63] Eyler Deposition, pp. 31-32 (emphasis added).

[64] See, *e.g.*, Eyler Deposition, pp. 41-42, 44-45, 142-143, and 146 for similar statements.

spot, so I *assumed* them to be the sum of equal to [sic] zero."[65]

52. While I understand that other experts will testify about the negative externalities caused by unregulated wine sales, it is not hard to infer the source of at least some of those externalities. Most notably, unregulated purchases by minors could well impose costs on society that are not borne by the suppliers or purchasers themselves. (*e.g.*, injuries or deaths caused by intoxicated drivers) – costs that are not reflected in the price suppliers charge and purchasers pay and that impose external effects on others. Direct shipments from numerous out-of-state wineries, over which New York State has more limited jurisdiction and control than it has over in-state wineries, would only increase the likelihood that such negative externalities would occur and would not be controlled.

53. By making additional assumptions, however, Dr. Eyler simply excludes the possibility of underage or binge drinking, let alone any negative externalities it might cause:

> I assumed that . . . the only participants on the demand side were legal buyers. If there are illegal buyers of wine, they are insignificant to a point that I could *assume them away* in the generalization . . .[66]

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[65] Eyler Deposition, p. 52 (emphasis added).

[66] Eyler Deposition, p. 35 (emphasis added).

> I should say it's an over riding [sic] assumption of the model that only those over 21 participate in the model and participate in the market.[67]

Moreover, although Dr. Eyler's affidavit seems to suggest that he opposes any government intervention,[68] he manages to explain why laws setting the minimum drinking age at 21 do not constitute intervention: "It's not a governmental intervention as we have defined it. It restricts who is the demand, not the quantity of the demand."[69]

54. Although it may be difficult to enumerate and quantify all the sources of externalities in this industry, measurement problems and arbitrary definitions do not imply that such externalities do not exist; that they are insubstantial; or that in any case, they are cancelled by positive externalities. Indeed, any assumption that net externalities are zero, while convenient, is unfounded. Policy conclusions based on such an assumption – including Dr. Eyler's conclusion that any government intervention would reduce societal welfare[70] – are no better than the assumptions on which they depend: Without factual support, such policy conclusions are unfounded.

55. As I have already noted (see section IV above), there are no effective impediments to access in the New

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[67] Eyler Deposition, p. 38. Asked where he stated that in his affidavit, Dr. Eyler replied, "I *assumed* it, I didn't say it anywhere." (emphasis added)

[68] "Any policy-driven deviation from market equilibrium, where the supply and demand for a good or service came together to find price and quantity in a market, is detrimental to societal welfare." (Eyler Affidavit, ¶ 16).

[69] Eyler Deposition, p. 35.

[70] Eyler Deposition, p. 10.

York wine industry. The state's ban on direct shipments from out-of-state wineries has not erected obstacles to out-of-state wineries' ability to sell to New York consumers or to consumers' ability to buy wine produced outside New York. In any attempt to balance the benefits and losses from government intervention, therefore, the benefits of reducing even small negative externalities could easily justify such government intervention. Dr. Eyler is simply wrong when he claims that "[t]he positive economic outcomes from direct shipping are unambiguous."[71] The allegedly "unambiguous" benefits from direct shipping simply reflect his *assumption* that there are no externalities.

B. Dr. Eyler's Claims about the "Monopolistic Filter" of Wholesale Wine Distribution in New York

56. Dr. Eyler claims in his affidavit that "[o]ut-of-state wines . . . must pass through the distributor's monopolistic filter, which artificially restricts entry to certain out-of-state firms."[72] That characterization of wholesale wine distribution in New York, however, betrays his lack of familiarity with the data, his incorrect understanding of the term "monopoly," and his failure to consider the conditions of entry into wholesale distribution of wine in New York.

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[71] Eyler Affidavit, ¶ 14.

[72] Eyler Affidavit, ¶ 15.

1. Dr. Eyler's Estimate of the Number of Wholesalers in New York

57. When asked how many New York wholesalers there are, Dr. Eyler replied, "I would say there is [sic] between seven and ten."[73] In fact, there are far more New York wholesalers than Dr. Eyler thinks.[74] Plaintiffs' own submissions in support of their motion for summary judgment include a 12-page list of 230 "Licensed Wine Wholesalers in New York State" provided by the Division of Alcoholic Beverage Control of the New York State Liquor Authority.[75] According to Plaintiffs' expert Hans Stern, the number is even greater: "The Bureau of Alcohol, Tobacco and Firearms records show that in December 2000 there were 825 wholesale licenses issued in New York."[76] Needless to say, those numbers greatly exceed Dr. Eyler's estimate of seven to ten wholesalers.[77]

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[73] Eyler Deposition, p. 197.

[74] There are also many more New York wholesale licensees than Plaintiffs' expert John Dyson is aware of. Mr. Dyson, who holds a majority interest in Pebble Ridge Vineyard, a licensed New York wholesaler, said he "would he surprised if there were more than ten or twelve" parties licensed to engage in wholesale distribution of wine in New York State. (Dyson Deposition, p. 182)

[75] See the August, 2, 2000 letter from Maris C. Hart, Deputy Commissioner of the Division of Alcoholic Beverage Control, and the attached list, which are part of Exhibit S of plaintiffs' submission.

[76] Affidavit of Hans L. Stern ("Stern Affidavit"), ¶23, Mr. Stern found it "[s]urprising, but not relevant," that the number had grown from 728 in 1970 to 825 in 2000 (Stern Deposition, pp. 277-280); nonetheless, such numbers hardly indicate the presence of barriers to entry into wholesale distribution.

[77] When informed of Mr. Stern's estimate, Dr. Eyler stated, "That would shock me, but I don't know his source of data." Asked where he got *his* information about the number of New York wholesalers, Dr.

(Continued on following page)

2. Dr. Eyler's Incorrect Use of the Term "Monopoly"

58. Even if Dr. Eyler's estimate were correct – and it certainly is not – it would be wrong to characterize the wholesale tier as a monopoly. As Samuelson and Nordhaus explain, for example,

> . . . [a] monopoly [is] a single seller with complete control over an industry. [fn. – It is called a 'monopolist,' from the Greek words *mono* for 'one' and *polist* for 'seller.'] It is the only one producing in its industry, and there is no industry producing a close substitute.[78]

Even if there were only seven to ten New York wholesalers, there certainly would not be "a single seller with complete control over [the] industry."[79] I know of no economist who would refer to an industry with seven to ten firms as a monopoly.[80] Furthermore, neither Dr. Eyler nor any other expert has claimed that New York wholesalers collude and act as a joint monopolist, and I am not aware of any evidence to support such a notion.

Eyler replied, "I gleaned it from industry sources and just over time I know, I have heard." (Eyler Deposition, p. 198)

[78] Samuelson and Nordhaus, *op. cit.*, p. 150. Similar definitions appear in other introductory textbooks.

[79] For the same reason, of course, Dr. Eyler's reference to a single distributor in his affidavit ("distributor's monopolistic filter") is inconsistent with his own estimate of the number of wholesalers.

[80] Indeed, some economists would argue that seven to ten firms may be enough to ensure that an industry's performance is workably competitive. A recent article on the wireless industry noted, "With *six* national carriers competing fiercely, it is all too easy for customers to jump to another company." (Andrea Petersen, "Battle to Improve Cellphone Service Continues as Quality Is Still an Issue," *The Wall Street Journal*, July 23, 2001, p. B1, emphasis added)

59. In reaching his conclusion that wholesale distributors in New York impose a "monopolistic filter" on wine distribution, Dr. Eyler apparently relies on an incorrect understanding of the term "monopoly," as the following exchange demonstrates:

> Q: So anything you sell gives you a monopoly in the sale of that product to some degree?
>
> A: Sure.
>
> Q: So everybody has a monopoly?
>
> A: That's the beauty of doing business.
>
> Q: So every business in America is a monopoly to some degree?
>
> A: To some degree, sure.
>
> Q: That's what you're trying to convey to the court here, because wholesalers are selling something, they have a monopoly power over what they sell?
>
> A: They may have a very small amount, but yes. Basically market structure in economics boils down to competitive and non-competitive. *Monopoly is a general term for non-competitive market structures.*[81]

I know of no economist who would agree that "monopoly is a general term for non-competitive market structures." Economists define "monopoly" in a straightforward and simple way – see, *e.g.*, the definition cited in the text above – and Dr. Eyler's usage is *not* consistent with the standard definition.

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[81] Eyler Deposition, pp. 209-210 (emphasis added).

3. Dr. Eyler's Failure to Analyze Entry Conditions

60. Even in markets in which incumbent firms have large market shares, economists agree that those firms cannot exercise market power unless there are, at a minimum, effective impediments to entry into or expansion within the market.[82] Without such impediments, new firms will enter the industry and existing participants will expand their presence, which would constrain any attempt by an incumbent firm to take advantage of its large share.

61. To the extent that Dr. Eyler has considered entry conditions at all, his analysis relies on faulty premises. In his affidavit, for example, he claims:

> From the distributors' perspective, the beauty of having only two domestic sources of wine – distributors and New York wineries – combined with a direct shipping ban, is that new market entrants do not exist.[83]

Dr. Eyler's assertion that there are "only two domestic sources of wine" is misleading, at best. As I have already noted, there are hundreds of New York wholesalers, each licensed to distribute wine from numerous wineries.

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[82] Similarly, in guidelines outlining its approach to the analysis of the likely effects of mergers, the Department of Justice states, "A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels." (1992 Horizontal Merger Guidelines [with April 8, 1997, Revisions to Section 4 on Efficiencies], revised April 8, 1997, §3.0, available at http://www.usdoj.gov/atr/public/guidelines/hariz_book/hmg1.html)

[83] Eyler Affidavit, ¶ 13.

Similarly, there are, of course, numerous New York wineries, as well as thousands of wineries outside New York State. I see no justification, therefore, for Dr. Eyler's claim that there are "only two domestic sources of wine."[84]

62. Moreover, as I have already noted, there are no effective impediments to entry into wholesale distribution of wine in New York. With numerous wholesale licensees available, wineries and retailers have numerous options from which to choose. Furthermore, without barriers to entry, there is no basis for Dr. Eyler's claim that "new market entrants do not exist."

63. In fact, Dr. Eyler apparently did not analyze very carefully either the conditions of entry into wholesale distribution in New York or the manner in which wholesalers operate. For example, he conceded that he does not know the legal requirements to become a wholesaler in New York, doesn't know what the barriers to entry are to wholesalers in New York, and doesn't know if there is any legal restriction that prevents an out-of-state winery from becoming a wholesaler in New York.[85] Remarkably, these obvious gaps in his analysis do not affect Dr. Eyler's conclusion, as the following exchange illustrates:

> Q: So without knowing what the barriers to entry are or how many wholesalers there are or what the competitive environment is among and between

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[84] I also see no justification for his focus in that statement on domestic wines only: Imported wines provide competition for domestic wines as well.

[85] Eyler Deposition, p. 200.

wholesalers, you would nevertheless describe them as having a monopolistic filter on sales?

. . .

A: Right.[86]

C. Dr. Eyler's Comparisons of Wine Prices in New York and in Other Groups of States

64. In an attempt to support his theoretical model, Dr. Eyler includes three tables in his affidavit, listing, for 1994-1998, "New York State Prices and Quantities for Table Wine. Off- and On-Premises" (Table 1), "Reciprocal State Average Prices, On- and Off-Premise" (Table 2), and "Non-Reciprocal States in the New England and Tri-State Areas" (Table 3). In a preview referring to the section in which he presents those tables, he states, "Comparisons with other states . . . show why this law should be repealed for society's economic betterment."[87] In fact, a more careful look at his data reveals that his price comparisons provide no support for his theory.

65. The problems with Dr. Eyler's empirical work stem ultimately from the highly aggregated price data he uses. His failure to control for any variables other than state importation laws only compounds his problems in any attempt to use the data to support his theoretical model. Numerous other factors (*e.g.*, differences in brand and/or varietal preferences, differences in on-premise vs. off-premise consumption, etc.) might explain differences among the states' prices, but he fails to account for them.

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[86] Eyler Deposition, pp. 211-212.

[87] Eyler Affidavit, ¶ 22.

66. In constructing his tables, Dr. Eyler uses 1994-1998 price data from MKF WineStats' "1998 U.S. Wine Report." For each state listed in his Tables 2 and 3, Dr. Eyler reports a single number for each year, the average retail revenue per nine-liter (9L) case equivalent. That single number, however, reflects the net effect of numerous factors that differ among the states. Because he fails to account for such factors or attempt to hold them constant in his analysis, Dr. Eyler cannot logically conclude that any difference he claims to observe between New York and other states stems from New York's ban on direct shipments from out-of-state wineries.

67. To understand why not, note first that Dr. Eyler's "price" data – actually, data on average revenue (*i.e.*, total revenue + total units) – at best reflect only prices that retailers charge their customers. Those prices depend on numerous factors that differ across the various states listed in his table – differences that have nothing inherently to do with the states' different laws on direct shipments of wine from out-of-state wineries. A consumer eating dinner in an upscale restaurant in New York City, for example, essentially faces a local monopoly: Having chosen to eat dinner at that restaurant, perhaps because of its reputation for fine cuisine, the consumer typically has no choice but to order wine from that restaurant (assuming that she wants to drink wine with her meal).[88] The New York restaurant might well pay very *low* prices

[88] The restaurant's wine list, of course, will inevitably include only a subset of wines that are produced, a fact that does not apparently trouble Dr. Eyler: " . . . I don't think it's a good economic choice in my opinion to have a restaurant have a bottle of every wine produced in the world or in the United States for that matter." (Eyler Deposition, p. 234)

for wines it buys from wholesalers, and it might then add very high markups in setting its retail prices.[89] If so, the retail price of the wine would be quite high, but it would not reflect any alleged "monopolistic filter" at the wholesale level or any particular effect of New York's ban on direct shipments from out-of-state wineries. Nonetheless, by relying on MKF's retail "price" data, Dr. Eyler would apparently attribute that high price to New York's ban on direct shipments, even though comparisons of retail prices in different states would shed no useful information on the effect of the states' different laws on direct shipping.

68. There are, of course, other reasons that a restaurant might charge relatively high retail prices for wine. As Plaintiffs' expert Hans Stern notes, for example, New York City restaurants can be particularly hard to service: "The logistics of obtaining orders, delivery, and collection from the thousands of Manhattan restaurants makes for a difficult and expensive task"[90] – an issue that Dr. Eyler was not aware of.[91] It would hardly be surprising to find that wholesalers dealing with such Manhattan restaurants set prices at levels designed to recover the high costs of the logistics of distributing to those restaurants – and that the restaurants in turn charge high prices for the wine they serve. But those prices would not reflect the effects of New York's ban on direct shipments. Wine prices

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[89] It is hardly surprising that the prices of many goods and services in New York City are quite high relative to prices elsewhere: The cost of real estate and other inputs are higher than in many other areas, so retailers' long-run viability depends on their ability to charge prices that are high enough to cover their costs.

[90] Stern Affidavit, ¶ 24.

[91] See Eyler Deposition, pp. 162-163.

in New York City, of course, affect the average price that Dr. Eyler reports for New York. High retail prices in New York City, therefore, certainly provide at least part of the explanation for Dr. Eyler's finding (in his Table 2) that the average price in New York exceeds the average price in Idaho, for example.

69. Differences in shipping and handling costs might also account for part of the differences between prices in different states. Most US wine is produced on the west coast, and only one of the reciprocal states listed in Dr. Eyler's Table 2 (reciprocal states) is located on the east coast;[92] all of the states in his Table 3, by contrast, are on the east coast. Dr. Eyler, however, "*assume[d]* the cost difference [for shipping to different states] is negligible,"[93] so he did not account for differences in shipping costs. Note, however, that MKF WineStats' "1998 U.S. Wine Report," the source of Dr. Eyler's data, itself cited "lower shipping costs" as one of the reasons prices are lower in the Pacific Region than they are elsewhere.[94]

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[92] The one exception is West Virginia.

[93] Eyler Deposition, p. 150 (emphasis added).

[94] MKF WineStats, "1998 U.S. Wine Report" (St. Helena, CA: Motto Kryla & Fisher LLP, 1999), p. 4, Plaintiffs' expert John Dyson, who owns majority interests in wineries in New York, California, and Italy as well as a licensed New York wholesaler, stated, "There is a difference [in distribution costs] the farther away you go from the port of entry or the location of production, of course." (Dyson Deposition, p. 140) Discussing wine sold by Millbrook, his New York winery, Mr. Dyson said he believes that the retail price in California "is somewhat higher [than in New York] reflecting the transportation cost, which gets factored into all of these markups." (Dyson Deposition, p. 181) In an exchange about wine he imports into New Jersey from Villa Pillo, the Italian winery in which he has a majority interest, Mr. Dyson estimated those extra costs:

(Continued on following page)

70. Because the MKF "prices" on which Dr. Eyler relies are weighted average prices for each state, there are other reasons to question the validity of his cross-state comparisons. More specifically, the prices he reports for each state in his Tables 2 and 3 are weighted averages of the on- and off-premise average retail prices for that state, where the weights are the fractions of total wine consumption that are on and off premises, respectively. For New York, for example, MKF reports on- and off-premise wine consumption of 3,116,000 and 14,908,000 nine-liter case equivalents, respectively; total consumption, therefore, was 3,116,000 ÷ 14,908,000 = 18,024,000 nine-liter case equivalents. Average retail prices were $182.80 (on-premise) and $65.54 (off-premise). The weighted average price for New York, therefore, was

$$(3{,}116{,}000/18{,}024{,}000)(182.80) + (14{,}908{,}000/18{,}024{,}000)(65.54)$$
$$= (0.1729)(182.80) \div (0.8271)(65.54)$$
$$= \$85.81$$

The average prices Dr. Eyler reports for other states reflect analogous computations of weighted averages.

Q: And what percentage of the wholesale price you charge California would be attributable to those extra delivery costs associated with having to get the product from New York or the port of New Jersey out to California?

A: I'd say $4 dollars [sic] or $5 a case perhaps. So –

Q: That would be 5%?

A: 5%.

(Dyson Deposition, pp. 140-141)

71. But the use of such weighted averages further undermines Dr. Eyler's cross-state comparisons of average prices. By using such weighted averages, he fails to compare apples to apples and oranges to oranges. To understand why, consider the following table, which includes data for Illinois and West Virginia, two of the reciprocal states in Dr. Eyer's Table 2, as well as data for New York. All of the data in the table below come from MKF WineStats' "1998 U.S. Wine Report," Dr. Eyler's data source; the shaded data are those he included in his affidavit.

Table A

1998 Data

	9L Case Equivalents (000s)			Dollars/9L Case		
State	On-Premise	Off-Premise	Total	On-premise	Off-premise	Average
NY	3,116	14,908	18,024	$182.80	$65.54	$85.81
IL	1,179	9,592	10,771	$192.07	$67.89	$81.48
WV	44	424	468	$186.32	$67.22	$78.35

72. Note that *both* the on-premise and the off-premise prices in Illinois exceed their counterparts in New York. The (weighted) average price listed in the last column, however, is greater for New York than for Illinois. The explanation is straightforward: In New York, a larger fraction of total consumption takes place in on-premise facilities, so the *weight* on the on-premise price in New York is greater than the weight on the on-premise price in Illinois. Since the on-premise price is considerably higher than the off-premise price in *each* state, the higher weight on New York's on-premise price – and the correspondingly lower weight on the off-premise price, since the two weights must sum to one (1) – makes New York's weighted average price higher than Illinois'.

73. To see these points explicitly, consider the computation of the two states' (weighted) average prices:

Weighted average price for NY
= (3,116/18,024)($182.80) +
(14,908/18,024)($65.54)
= (0.1729)($182.80) + (0.8271)($65.54)
= $85.81

Weighted average price for IL
= (1,179/10,771)($192.07) +
(9,592/10,771)($67.89)
= (0.1095)($192.07) + (0.8905)($67.89)
= $81.48

The difference in weights for the two states shows up most clearly on the second lines of the two computations above. In New York, the weight on the on-premise price ($182.80) is 0.1729 (17.29%); in Illinois, on the other hand, the weight on the on-premise price ($192.07) is only 0.1095 (10.95%). Since the two weights must sum to one (1) for each state, the weight on the off-premise wine price, a

price that is considerably lower than the on-premise price in each state, is higher in Illinois than in New York. Thus, although Illinois' on-premise price per nine-liter equivalent is more than $9 greater than New York's *and* Illinois' off-premise price is more than $2 greater than New York's, the weighted average price – the price Dr. Eyler reports in his Table 2 – is actually higher in New York. Even if the differences between New York's and Illinois' laws on direct shipments were the only differences between them – and even if the removal of New York's ban on direct shipments caused New York's on- and off-premise prices to match their corresponding levels in Illinois – it is hard to see why New York consumers would be better off: In that scenario, both on- and off-premise prices would actually *increase* after the removal of the ban.[95]

74. The same relationships hold for the comparison of prices in New York and West Virginia: Although West Virginia's on-premise price *and* off-premise price exceed their New York counterparts, the weighted average price – the price Dr. Eyler reports in his Table 2 – is actually higher in New York.[96] By comparing weighted average

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[95] Dr. Eyler's conclusion in ¶29 of his affidavit reflects similar logical flaws: "If, for illustrative purposes, we assume that the wine price in the average reciprocal state would be the price in New York after the direct shipping law was repealed, consumers and society unambiguously gain."

[96] In the computation of the weighted average price for West Virginia, the weight on the on-premise price is only 9.40% (44/44+424) = 0.0940); the weight on the off-premise price is 90.60% (424/(44+424) = 0.9060).

prices across states, therefore. Dr. Eyler is not comparing apples to apples.[97]

75. Of course, the problems with Dr. Eyler's empirical approach run much deeper. Even the on- and off-premise prices reported for each state are highly aggregated weighted averages. The on-premise price for any particular state, for example, is the weighted average of retail prices for all wines bought at all kinds of on-premise facilities, including restaurants of all kinds (where drinking wine is legal), wineries (tastings), bars, and so forth. Those prices may vary for many reasons having nothing to do with a state's stance on direct shipping, including for example, whether the consumer bought a glass, a bottle, or a case (the price per liter is typically greater for a glass than for a bottle and greater for a bottle than for a case); whether the state's laws partition on-premise and off-premise establishments from each other; days and hours of business, and so forth.

76. More fundamentally, there is no reason to believe that the particular wines that enter into the computations of two states' average prices are the same, as Dr. Eyler himself admitted at his deposition:

> Q: . . . the comparison between states is not of the same wines, is it?
>
> A: I have no idea if they are of the exact same wines. I made a general statement there that the wines available to distributors in other states would probably be the same

[97] For further discussion of some of these issues, see the discussion at Eyler Deposition, pp. 172-175.

> wines essentially available to distributors in New York.
>
> Q: You made that assumption?
>
> A: I made that assumption.[98]

It is clear, therefore, that Dr. Eyler's Tables 1-3 do not address the issue he himself raised in his affidavit: "One of the main issues to be addressed below is whether New York prices are higher or not than in states without this law *for the same wines*"[99] When questioned about that statement, Dr. Eyler conceded:

> So the word same may be a little strong, but I think that as far as the model goes, the conclusions would not be different in whether the mix was different.[100]

77. In light of the many defects in his empirical approach, Dr. Eyler's admission at his deposition – "I did not try to draw conclusions from the data"[101] – is hardly surprising. Indeed, it is quite appropriate: His flawed empirical analysis does not permit him – or anyone else, for that matter – to draw any conclusions.[102]

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[98] Eyler Deposition, p. 180.

[99] Eyler Affidavit, ¶12 (emphasis added).

[100] Eyler Deposition, p. 321.

[101] Eyler Deposition, p. 181. See also p. 170, where Dr. Eyler states: "I'm not trying to prove it with the data, I'm trying to be illustrative of what may be happening. *Theoretically speaking*, the conclusions would be the same regardless." (emphasis added)

[102] When asked how he would explain why the price of wine has risen more dramatically in California than it has in New York in recent years, Dr. Eyler indicated that there were many factors he might want to consider: ". . . it could be simply that in California there is more demand than in New York, suddenly there has been a surge, there has

(Continued on following page)

VII. Conclusion

78. In light of the foregoing, it is clear that, by any reasonable economic test, the wine market in New York State is one in which competition is open, intense, and effective, and in which access – for both suppliers of wine and consumers of wine – is unimpeded. That some suppliers and/or consumers may prefer to conduct business in a certain manner that is not directly available to them does not affect this conclusion: Few if any markets provide an unlimited number of channels of production, distribution, and/or purchase for any and all who wish to participate.

79. Plaintiffs' experts' views are simply beside the point: They postulate circumstances that either bear no resemblance to the realities of the market at issue or, in their focus upon isolated individuals, fail to consider the prevailing economic characteristics of the market. To repeat, this is a market replete with realistic alternatives available to consumers, and there are no realistic impediments for wineries of any size or location to compete for the patronage of those consumers.

/s/ Howard P. Kitt
Howard P. Kitt

[sic] been income changes, . . ." "I would have to look at the macroeconomic data for California and New York and compare them." "I would say that if I was given the chance, I would use the interest rates, the prices, the unemployment rate, gross state products, . . ." In using MKF's data to compare the *levels* of different states' prices, however, Dr. Eyler said "you could" use such data or "you could just assume that relatively speaking the differences don't really matter much to the pricing, that it's industry specific rather than macroeconomic, but it would be good to confirm that." (Eyler Deposition, pp. 255-257)

Subscribed and sworn to before
me this 16th day of August, 2001

/s/ A. Andrew Hund
Notary Public

My commission expires 6/26/02

A. ANDREW HUND
Notary Public, State of New York
No. 01HU6043948
Qualified in New York County
Commission Expires June 26, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted in Printing]

Affidavit of Henry Wechsler,
sworn to on August 10, 2001, in Support of
Defendants' Cross-Motion for Summary
Judgment and in Opposition to
Plaintiff's Motion for Summary Judgment,
dated August 17, 2001

STATE OF MASSACHUSETTS)
) SS:
COUNTY OF NORFOLK)

HENRY WECHSLER, being duly sworn, deposes and says:

1. I, Henry Wechsler of Quincy, Massachusetts, have been asked to provide expert testimony on behalf of the Attorney General of New York State in this case. I am testifying in opposition to changing the current system of alcohol distribution and sales in New York so as to allow direct sales from out-of-state suppliers to New York residents through mail, telephone, and Internet orders. I oppose this change because in my expert opinion it would increase the access of underage youth to alcohol, weaken the current system of controls over underage drinking, and increase underage drinking and the resulting harms. This is the first time I am providing expert testimony despite numerous requests to do so over the years. I am doing so because this is such an important issue.

2. I am a public health researcher specializing in studies of alcohol use and problems among young people. My experience and scholarly work in this field are reflected in

my current curriculum vitae, which I have enclosed as exhibit A.

3. I received my Ph.D. degree in social psychology from Harvard University and have been on the faculty of the Harvard School of Public Health since 1966. I have regularly taught courses there on "Alcohol Abuse and Alcoholism from a Public Health Perspective" and "An Introduction to High Risk Behaviors: Epidemiology and Prevention and Public Policy." I have also held appointments as Adjunct Professor at the Boston University School of Public Health and the Simmons College School of Social Work. I was Research Director and Associate Executive Director of the Medical Foundation Inc. in Boston.

4. I have published 17 books and monographs and more than 150 articles in professional journals including the Journal of the American Medical Association, the New England Journal of Medicine, the Journal of Studies on Alcohol, the American Journal of Preventive Medicine, the American Journal of Public Health, and the Journal of the American College Association. I am a member of the National Institute on Alcoholism and Alcohol Abuse Special Task Force on College Drinking, and I have consulted with a number of colleges and state agencies about student alcohol issues. In Massachusetts I was a consultant to the Governor's Alliance Against Drugs. I have been a keynote speaker at a number of national and state organizations including the American Society of Addictive Medicine, the New York State College Consortium in Alcohol and Other Drugs, the National Conference of State Liquor Administrators New Jersey Summit, the Mother's Against Drunk Driving College Commission, the Association for Medical Education and Research in

Substance Abuse, the American Society of Addiction Medicine, the National Association of Student Personnel Administrators, the National Alcohol Beverage Control Association National Alcohol Education Symposium, and the Association of American Colleges and University Program for Health and Higher Education. I also lecture nationally to college administrators, college health personnel and students about binge drinking and other forms of high risk behavior. I am the recipient of the American College Health Association's Clifford B. Reifler Award for my research contributions.

5. I published my first study on the topic of alcohol use in 1969, and since then have published over 50 research articles in professional journals on alcohol and substance abuse. In the 1970s, when most attention was placed on marijuana and other illicit drug use, my research pointed to the greater prevalence and harms resulting from alcohol abuse.

6. I am perhaps best known for my work as the Principal Investigator of the Harvard School of Public Health College Alcohol Study, an ongoing survey of a nationally representative sample of 14,000 students at 119 four-year colleges in 40 states. The first landmark study, published in 1994, focused national attention on the problem of "binge drinking" on college campuses and on the harmful, "second-hand" effects on other students.[1] The wide dissemination of this study's results has led to the strengthening of efforts on college campuses and home communities to reduce the heavy levels of use among college students.[2]

7. The role that public policy plays in affecting the levels of underage drinking and the harms that are associated

with this problem is a central part of the study. My own research has pointed to college students' relatively easy access to large supplies of alcohol, and the relationship of such access to student "binge" or heavy drinking.[3] In that study two of the strongest predictors of binge drinking among underage students were ease of access and low price per drink.

The Minimum Drinking Age

8. Perhaps the most effective countermeasure against youthful drinking and the problems that it engenders is the 21-year minimum drinking age. In 1984 the passage of the national Uniform Drinking Age Act led to the adoption of the minimum legal drinking age (MLDA) of 21 in all states. Since 1975, the National Highway Traffic Safety Administration estimates that the MLDA of 21 has saved over 19,000 lives among persons in accidents involving drivers 18 to 20 years of age – 900 in 1999 alone, reducing fatalities by about 13%. The proportion of youth fatalities that were alcohol related dropped from 63.2% in 1982 to 35.1% in 1999.[4]

9. Studies of highway fatalities when the MLDA in most states was lowered in the 1970's revealed a similar increase in deaths during that time period.[5]

Underage Alcohol Use

10. While the effect of the MLDA has been positive, underage alcohol use remains a serious national problem. Enforcement is often lax, and the agencies involved are under-funded in many states.[6] Fake IDs and the provision of alcohol to underage persons continue to present serious

enforcement problems. Studies of drinking establishments show that compliance needs to be improved.[7]

11. Today even with the improving situation attributed to the MLDA law, more than half of 8th graders and four of five high school seniors have tried alcohol. One in two high school seniors and two in three underage college students reported consuming alcohol in the past month.[8] Among college students, those who were underage reported drinking on fewer occasions than their of-age classmates. When they drank, however, underage students drank more alcohol per occasion.[3]

12. This is the essence of the problem with underage drinking in the United States. Thirty percent of high school seniors, or more than half of those who drank, reported consuming five or more drinks in a row, an amount associated with alcohol related problems. Two in five underage college students drank five or more drinks in a row, compared to only one in four of-age students. Even among 8th graders, 15% reported drinking five or more drinks in a row. These levels of heavy drinking characterize the prevalent manner in which underage students drink.[8]

13. As a result, it is not surprising that underage drinking is associated with high levels of morbidity and mortality. In 1999 over 2,000 youth died in alcohol related crashes.[4] While raising the MLDA has contributed to a gradual decrease in alcohol related fatalities under current levels of enforcement, automobile fatalities involving drinking drivers are still the number one cause of death among persons under 21. In addition to traffic fatalities, underage drinking is a major factor in unintentional injuries from burns and falls, violence and crime, and

suicide. Fetal alcohol syndrome and alcohol poisonings are among the direct consequences of such drinking.[9] Heavy drinking among young people has also been associated with unsafe sexual practices through lower levels of condom use.[10]

14. In my own research, frequent binge drinkers were found to be ten or more times more likely to get into trouble with the police, be involved in verbal or physical violence, vandalize property, or become hurt or injured.[11]

15. All in all, it is estimated that underage alcohol use costs the nation more than 50 billion dollars per year.[9] Underage drinking also poses a potential to alcohol problems later in life. The earlier the age of the first drink or intoxication, the greater the likelihood of alcohol problems in adult life, and of alcohol related injuries from automobile collisions.

16. As widespread as these consequences of underage drinking are today, research findings suggest that they would increase dramatically if the MLDA was lowered or the current policies and levels of enforcement were decreased.

Enforcement Level

17. Where there are more controls over underage drinking – with more careful and frequent ID checks – drinking by this age group, and heavy drinking in particular, is lower. Community wide efforts to accomplish this have reported some success.[12-15]

Ease of access to alcohol

18. Ease of access to alcohol for underage students is a key factor in their drinking participation and in the number of drinks consumed per occasion. While research has shown that access to alcohol is relatively easy for most college students, underage students at colleges where it is easiest to obtain alcohol are more likely to binge drink and to experience higher rates of alcohol related problems.[3]

19. Studies have shown more drinkers and higher levels of drinking with increased hours of sale, days of sale, and with greater numbers of alcohol establishments in a geographic area or higher outlet density.[16]

State Alcohol Retail Sales Monopolies

20. Several states have made changes in the system of distributing alcohol. Researchers have studied the effects of privatization, the changeover to private sales from a system of state run retail monopolies in seven states as well as several Canadian provinces, and countries. The balance of evidence suggests that sales and consumption increases availability through major increases in the number of outlets, and changes in marketing practices, increasing hours and days of sale.[17-20] A review of the studies indicate that lower prices, and an increase in the volume of alcohol sold usually follow privatization. Lower prices have been found to be associated with higher consumption, and more binge drinking in other studies.[15]

Extending Alcohol Sales to Other Types of Outlets

21. Expanding the number of outlets by allowing sales of some forms of alcohol in other types of establishments –

such as groceries and fast food restaurants – has been found to be associated with more alcohol consumption and higher levels of outlet related problems.[21-23]

Outlet Density

22. Studies on the number of outlets in a region show a positive relationship to volume purchased, heavy consumption, and higher levels of alcohol related problems.[24-27] Some studies have found that rates of drunk and disorderly behavior, homicides, and automobile collisions are higher in areas where there are more alcohol outlets.[24, 28-30]

Hours and Days of Sale

23. Similarly, some studies have found that increasing the hours and weekend days that alcohol is sold is associated with more automobile collisions, more domestic violence, and more drunkenness.[31-36]

Home Delivery

24. Perhaps no other method of sale decentralizes control policies to the same extent as home deliveries. While such distribution of alcohol is permitted in some states, only one study was found examining the potential consequences of this system. About one in ten underage students reported utilizing this system of delivery and thus eluding ID checks.[37] These students tended to be the heaviest drinkers and were more likely to experience alcohol related problems. Furthermore, establishments providing home delivery more often sold alcohol in such large volume as kegs than other outlets.[37] This home delivery of alcohol in bulk to heavier

drinkers and potential party hosts poses new ways of circumventing the MLDA law.

Direct Sales of Alcohol Via Internet, Telephone, or Mail

25. While no studies have yet been reported regarding the effect of allowing alcohol to be sold directly over the Internet, telephone, or through the mail, what we know about the factors that affect underage drinking allows us to reach certain conclusions. In my expert opinion, changing the system of sales in New York by greatly increasing the number and type of suppliers who can sell alcohol products directly to New York consumers is likely to lead to a breakdown of controls over underage drinking. Even under the current system of controls which needs strengthening, the MLDA of 21 has resulted in a saving of 19,000 lives. Allowing delivery services to check ages of persons obtaining alcohol will increase the number of persons and sites involved in the control system, and consequently increase the chance of unintentional or intentional errors. Removing the possibility of face to face ID checks by trained personnel is at best a risky practice. Allowing direct sales is also likely to lead to more aggressive marketing practices and promotions, increasing the exposure of underage persons to stronger selling pressure. I also understand that those seeking this change argue that it will result in a drop in the price of alcohol in the long run, which in turn would, in my expert opinion, result in a subsequent increase in underage consumption. We should be strengthening the system of controls over underage drinking, and not weakening it. From a public health perspective, I view allowing the direct sale of alcohol through the Internet, telephone and mail to be a dangerous idea, and a bad public policy for any state such

as New York that wants to promote temperance, by increasing abstinence and decreasing heavy drinking among persons under the legal drinking age.

Direct Shipping by Certain New York Suppliers

26. I have been informed that New York State does permit certain in-state licensees to make direct shipments of alcoholic beverages to New York consumers in some cases. I strongly oppose these exceptions. However, I have also been informed that New York State does have the ability to control in-state shipments not present in the case of direct shipments by out-of-state sellers; for example, New York is able to hold in-state suppliers accountable for any violations of law because they are licensed by and present in New York State. I also understand that such violators may be subject to various civil and criminal sanctions, including sanctions under New York's Dram Shop Act. In any event, allowing all out-of-state suppliers to ship their products directly to New York consumers would, in my opinion, greatly increase the type and extent of problems far beyond those that may occur from direct shipments by a limited number of New York suppliers.

/s/ _____
Henry Wechsler

Subscribed and sworn to
before me this 10th day
of August, 2001

/s/ _____
Notary Public

My commission expires 7-2-2004

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

Affidavit of Thomas G. McKeon, sworn to on August 17, 2001, in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, dated August 17, 2001

AFFIDAVIT OF THOMAS G. McKEON

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS G. McKEON, being duly sworn, deposes and says:

1. I am General Counsel to the New York State Liquor Authority ("SLA"), and report directly to the Commissioners of the SLA, who are defendants in this action (the "State SLA defendants"). I am personally familiar with the operations of the SLA as well as the laws and regulations pertaining to alcoholic beverage control in New York State. I submit this affidavit in support of the defendants' and intervenor-defendants' motion for summary judgment dismissing the complaint.

2. Plaintiffs challenge the right of the State of New York ("State") to enforce the prohibitions set forth in paragraphs (a), (c) and (d) of subdivision 1 of section 102 of the New York State Alcoholic Beverage Control Law

("ABC Law"). No other provision of the ABC Law is in issue (*see* Stipulation, dated March 28, 2001).

3. Because plaintiffs' challenge to ABC Law § 1-2 involves the scope of the State's legislative authority to regulate alcoholic beverages, it is appropriate to begin with the United States Constitution as the backdrop for the ABC Law.

4. The Eighteenth Amendment to the Constitution (the Prohibition Amendment) prohibited the importation of intoxicating liquors into the United States, and also prohibited the manufacture, sale, or transportation of intoxicating liquors within the United States. The Eighteenth Amendment was ratified on January 16, 1919, and became effective on January 16, 1920.

5. The Twenty-first Amendment to the United States Constitution, ratified on December 5, 1933, repealed the Eighteenth Amendment. Section 2 of the Twenty-first Amendment provides as follows:

> Amendment XXI. Repeal of Prohibition Amendment
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

6. Within the scope of the power reserved to the states by the Twenty-first Amendment, a state currently possesses the legal authority to enact a state law establishing, within the state's boundaries, as sweeping a prohibition against alcoholic beverages as the prohibition

which had formerly been established by the Eighteenth Amendment within the entire United States.

7. As an alternative to absolute prohibition, a state may elect (as did New York and many others) to enact legislation which permits the importation or shipment of alcoholic beverages into the state upon such terms and conditions as its legislature may find reasonable "for the protection, health, welfare and safety of the people of the state" (*see, e.g.*, ABC Law § 2 (McKinney 2000)). Because the traffic in alcoholic beverages is a business attended with danger to the community, a state, in the exercise of its police power, is fully competent to suppress such traffic in alcoholic beverages under such laws as will limit to the utmost its evils. *Crowley v. Christensen*, 127 U.S. 86, 91 (1980).

8. By enactment of Chapter 108 of the New York Laws of 1933, the New York State Legislature ("Legislature") created a temporary State Alcoholic Beverage Control Board to immediately deal with the changing circumstances surrounding the repeal of prohibition. In 1934, the Legislature enacted Chapter 478 of the New York Laws of 1934, creating the SLA and promulgating core provisions of the ABC Law. By doing so, the Legislature adopted in New York State a three-tier system for the importation and distribution of alcoholic beverages, much like that adopted in most other states following the repeal of Prohibition.

9. ABC Law § 2 expressly provides that it is "declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their

consumption and respect for and obedience to law" (ABC Law § 2). With respect to the many provisions contained in the statute, the Legislature stated (ABC Law § 2):

> The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state.

10. The backbone of this new regulatory scheme, the three-tier system, has as its fundamental requirement that all sales within the State must be made to or by state-licensed entities. The three-tier system is the critical foundation of the regulatory scheme established by the State in 1934 and continued without interruption ever since. As applied to liquor, wine or beer, the three-tier system is designed to limit the power of distilleries, wineries and breweries in the marketplace; to prevent independent retailers from coming under the control of a manufacturer or wholesalers in a "tied-house" relationship; and to establish and maintain balanced, orderly markets for the distribution and sale of alcoholic beverages. Under the three-tier system, it is the wholesaler tier that is responsible for collecting and remitting to the State excise taxes on alcoholic beverages. (The taxation provisions relating to alcoholic beverages are now found in the New York Tax Law §§ 420, et seq.) The State's interest in the collection of tax revenues is thereby furthered by making the state-licensed wholesalers accountable for such tax revenues.

11. The ABC Law enacted by the Legislature permits commercial alcoholic beverage traffic under the regulatory supervision of the SLA, and in accordance with a comprehensive and carefully detailed regulatory scheme. The ABC Law sets forth, amount other things,

the policy and purpose of the statute; the powers of the SLA; the persons who are prohibited from receiving a license to engage in commercial alcoholic beverage traffic; the information which must be submitted to the SLA in connection with an application for a license; the civil and criminal penalties which may be imposed for a violation of the ABC Law; the acts which will constitute a violation; the various types of commercial alcoholic beverage traffic which will be permitted by the State; and the conditions and restrictions imposed in connection with each type of traffic the State elects to permit.

12. It is to the SLA that the Legislature has delegated the State's broad police power to regulate alcoholic beverages (ABC Law § 2):

> It is hereby declared that such [State] policy [to regulate and control alcoholic beverages] will best be carried out by empowering the liquor authority of the state to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby, subject only to the right of judicial review. . . .

13. The SLA is composed of three Commissioners, one of whom is designated Chairman. The agency maintains offices in New York City, Albany, Buffalo, and Syracuse, and employs approximately 200 persons. Among the powers which the ABC Law specifically delegates to the SLA is the power to approve or disapprove any application for an alcoholic beverage license or permit provided for in the ABC Law (ABC Law § 17(1)), the power to limit the number of licenses (ABC Law § 17(2)); the power to

revoke, cancel, or suspend any license or permit for cause (ABC Law § 17(3)); the power to fix by rule the standards of manufacture and fermentation in order to insure the use of proper ingredients and methods in the manufacture of alcoholic beverages to be sold or consumed in the state (ABC Law § 17(5)); and to establish an alcoholic training awareness program to be used by schools and retailers (ABC Law § 17(12)).

14. The day-to-day activities of the SLA staff include the review and investigation of license applications, renewal applications, and permit requests; the investigation of alleged violations of law and SLA rules by alcoholic beverage licensees and permittees; working with local law enforcement agencies to ensure compliance with the ABC Law; the conduct of administrative disciplinary proceedings against licensees and permittees; and inspecting premises where alcoholic beverages are manufactured or sold (including the premises inspections resulting in the detection of underage patrons and false ID's).

15. The SLA regulates nearly 70,000 licenses and permits statewide each year. In 2000, the SLA issued over 6,500 new licenses, and issued more than 18,600 licenses in response to renewal applications. *See* 2000 SLA Annual Report (annexed hereto as Exhibit A) at 6. The SLA collected over $30.2 million in licensing revenues in 2000 and is one of the largest generators of revenue to the State Treasury. *See* 2000 SLA Annual Report at 6.

16. All those involved in the commercial manufacture, sale (wholesale and retail), storage, or transportation of alcoholic beverages in the State must obtain from the SLA a license (or permit), which confers to the

licensee or permittee the privilege of conducting a statutorily-defined type of alcoholic beverage business at a specific location within the State. *See*, *e.g.*, ABC § 100(1) (appropriate license required to manufacture or sell at wholesale or retail); ABC § 96 (warehouse license required for storage of alcoholic beverages in commerce); ABC § 94 (trucking permit required for transportation of alcoholic beverages in commerce).

17. Not all persons are eligible for an alcoholic beverage license. An individual person under twenty-one years is ineligible for a license (ABC Law § 126(2)). Only a United States citizen or an alien lawfully admitted for permanent residence may be issued a license (ABC Law § 126(3)). Persons convicted of a felony or certain specified misdemeanors are forbidden to hold a license (ABC Law § 126(1)). Persons who have had an alcoholic beverage license revoked are forbidden to hold a license for a period of two years from the date of such revocation (ABC Law § 126(5)(a)). Persons not holding an alcoholic beverage license who have been convicted of a violation of the ABC Law are forbidden to hold a license for a period of two years from the date of such conviction (ABC Law § 126(5)(b)). Employees of the SLA are forbidden to be licensed or to hold any interest in a license, licensed business, or licensed premises (ABC Law § 16). Police officers are forbidden to hold a license or be interested in a license or licensed business (ABC Law § 128). Pursuant to the tied house restrictions, the licensing requirements and application process are designed to detect, and prohibit, tied house arrangements where a manufacturer or wholesaler holds an interest in a retail license (ABC Law § 101).

18. The ABC Law provides for a rigorous license application process. Section 2 of the ABC Law requires the SLA to determine whether approval of a particular license application will serve public convenience and advantage. The extensive information gathered during the course of the application process is intended to insure that alcoholic beverage licenses will be granted only to persons of good character, for businesses and premises which will serve the public interest.

19. In addition to submitting information with regard to the specific disqualifications set forth in the ABC Law, an applicant for a license must also submit information from which the SLA may assess the applicant's overall character, fitness, experience, maturity, and financial responsibility (*See*, *e.g.*, Rules 54.7 and 55.5 of the Rules of the State Liquor Authority (9 NYCRR 48.7 and 49.5)).

20. Paragraphs (a), (b), and (g) of subdivision 1 of section 110 of the ABC Law require, in connection with an application for a license, that the applicant submit information which identifies with particularity the premises for which the license is sought; (in this regard, for retail licensees, no retail establishment can be within 200 feet of a school, church or synagogue (ABC Law § 105(3)), and the number of existing retail establishments in the vicinity of the applicant's premises must be identified); each person having an ownership interest in the business and premises for which the license is sought; and any person having an economic interest in the proposed licensed business or premises. The applicant is required to document the source of funds to be used in the licensed business (ABC Law § 110(1)(g)). Also required from the applicant and each partner or

principal is a ten-year history of any previous alcoholic beverage license or license application, whether in New York or any other jurisdiction (ABC Law § 110(1)(c)). A fingerprint card is required from each applicant, partner, or principal (ABC Law § 110(1)(h)). The applicant must submit documentation establishing control of the proposed licensed premises for a period not less than the license period of the license which is being sought (ABC Law § 110(1)(f)). A floor plan and photographs of the interior and exterior of the proposed licensed premises must be submitted (ABC Law § 110(1)(b)). The appropriate penal bond must be submitted in accordance with ABC Law § 112 and Rule 9 of the Rules of the State Liquor Authority (9 NYCRR 81).

21. Once a license has been issued, any premises where alcoholic beverages are manufactured or sold is subject to inspection (ABC Law § 18(4)).

22. All licensees must maintain adequate books and records and make them available for inspection by an authorized representative of the SLA (ABC Law §§ 103(7), 104(10), 105(15), and 106(12)).

23. Most violations of the ABC Law are criminal offenses. (ABC Law § 130). Police referrals to the SLA are mandated by ABC Law § 106-a(1) when police make an arrest for gambling activity, illicit drug activity, prostitution activity, weapons possession, a crime of a violent nature, or a breach of the peach which occurs on a licensed premises. Police agencies routinely advise the SLA's Enforcement Bureau of any violation of the ABC Law so that the SLA may take appropriate disciplinary action against the licensee.

24. Disciplinary penalties which may be imposed for cause by the SLA are license revocation, cancellation, or suspension; the imposition of a civil money penalty of up to $10,000 for most retail licensees, with greater civil money penalties provided for manufacturers and wholesalers (ABC Law § 17(3)); a two-year licensing ban where a license revocation has been imposed (ABC Law § 113); and a full or partial forfeiture of the penal bond filed by the licensee (ABC Law § 112) in the amount established by Rule 9 of the Rules of the State Liquor Authority (9 NYCRR 81).

25. A regulatory theme which is given effect in a number of ABC Law provisions is the legislative policy that the three tiers of the commercial alcoholic beverages business – manufacturers, wholesalers and retailers – remain independent from each other. The statutory provisions which enforce the three tier policy are intended to combat the evils of the tied house.

26. In New York, manufacturers, wholesalers, and retailers of alcoholic beverages operate under a statutory system intended to prevent tied house relationships, to preserve the economic independence of each licensee, and to establish a level playing field of even-handed competition which provides each licensee with a fair opportunity for economic success, but which avoids the public evils caused by destructive competition in the sale of alcoholic beverages.

27. Manufacturers and wholesalers are forbidden to make any gift to any person licensed under the ABC Law which may tend to influence the gift's recipient to purchase the product of such manufacturer or wholesaler (ABC Law § 101(c)).

28. Manufacturers and wholesalers are forbidden to make any loan to any person engaged in the manufacture or sale of any alcoholic beverage at wholesale or retail (ABC Law § 101(b)). Retail licensees are forbidden to make any loan to a person engaged in the manufacture or sale of liquors, wines, or beer at wholesale (ABC Law §§ 105(17), 106(14)).

29. Manufacturers and wholesalers are forbidden to enter into a contract with a retail licensee under which the retailer agrees to confine his sales to the products manufactured or sold by one or more of such manufacturers and wholesalers (ABC Law § 101(d)).

30. Manufacturers and wholesalers are forbidden to be interested directly or indirectly in any premises where alcoholic beverages are sold at retail, or in any business devoted wholly to partially to the sale of any alcoholic beverage at retail. This prohibition includes interests by way of stock ownership, interlocking directors, mortgages, liens, personal or real property, or "by any other means" (ABC Law § 101(a)).

31. Retail licensees licensed to sell liquors and/or wines for off-premises consumption are forbidden to be interested directly in any premises where liquors, wines, or beer are manufactured or sold at wholesale or any other premises where liquor or wine is sold at retail for off-premises consumption. This prohibition includes interests by way of stock ownership, interlocking directors, mortgages, liens, personal or real property, or "by any other means" (ABC Law § 105(16)).

32. Apart from a narrowly-draw exception, all licensees engaged in the retail sale of alcoholic beverages for on-premises consumption are forbidden to be

interested directly or indirectly in any premises where liquors, wines, or beer are manufactured or sold at wholesale. This prohibition includes interests by way of stock ownership, interlocking directors, mortgages, liens, personal or real property, or "by any other means" (ABC Law § 106(13)).

33. By Chapter 899 of the Laws of 1942, the Legislature added section 101-b to the ABC Law. ABC Law § 101-b(2)(a) forbids any person who sells liquors or wines to licensed wholesalers or retailers "to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality." One of the objectives of this provision is to prevent a commercial seller of alcoholic beverages from offering to a favored licensed commercial purchaser a special (usually secret) discount which is not made available to all like situated licensed commercial purchasers. In prohibiting a commercial seller of alcoholic beverages from discriminating between licensed commercial purchasers of the seller's product, ABC Law § 101-b(2)(a) seeks to establish a level playing field which will insure that each licensee is truly independent and not "tied" to a commercial supplier or purchaser by a special private economic arrangement which operates to the exclusion and the detriment of similarly situated licensees.

34. In simple terms, ABC Law § 101-b(3) requires that a licensed wholesaler who sells alcoholic beverages to a licensed retailer for commercial resale by the retailer must file with SLA a schedule which lists the prices at which the wholesaler will sell its products to a

retailer. The sale of product by a wholesaler to a retailer at other than the price and discounts listed in the price schedule filed by the wholesaler is prohibited. Additionally, ABC Law § 101-b (4-a) makes it unlawful for a wholesaler to refuse a sale to an appropriately licensed retailer. The requirement that a licensed wholesaler make sales in conformity with filed price schedules insures that all retailers who deal with a particular wholesaler will do so on an equal and independent footing. A wholesaler who provides special, secret discounts to favored retailers in order to exert control over them does so in violation of the statute, and jeopardizes its license. In addition to the requisite price postings that a wholesaler must file, the manufacturer-producer must file its own price schedules designating the prices at which the producer will sell its product to a wholesaler. The combined effect of the price postings of the manufacturers and wholesalers is to ensure an accountable, level playing field, free from the ill effects of a tied house.

35. In furtherance of the legislative policies expressed above and based upon the records maintained by the SLA in the regular course of business, in the last five years, the SLA has handled 21,281 matters against licensees for alleged violations of the ABC Laws (*see* SLA Annual Reports for Years 1996 (p. 31), 1997 (p. 35), 1998 (p. 35), 1999 (p. 21) and 2000 (p. 12) (*see* Ex. A). Among the matters investigated or prosecuted by the SLA over the years are the following: the keeping of alcoholic beverages for sale in bottles (1) whose contents have been contaminated with filth, (2) whose contents have been "watered", and (3) which have been refilled with different (cheaper) product; the manufacture, distribution and sale of alcoholic beverages by persons with criminal

backgrounds who are not eligible for a license; sufferance or permission by a licensee of on-premises gambling or disorders (which include altercations and assaults, drug use or sales, lewd and indecent performances or conduct, and prostitution); and the sale of alcoholic beverages to minors and visibly intoxicated persons.

36. In 1999 alone, the SLA considered 4,870 disciplinary and licensing matters, revoked 142 licenses, cancelled 241 licenses, suspended 274 licenses, issued 8 summary suspensions involving threats to the quality of community life, and imposed $7.7 million in fines. *See* 1999 SLA Annual Report at 7. In 2000, the SLA considered 3,415 disciplinary matters, revoked 93 licenses, canceled 292 licenses, suspended 186 licenses, issued 15 summary suspension orders and imposed substantial monetary fines. *See* 2000 SLA Annual Report at 13-14.

37. A November 14, 2000 printout from the agency's computer data base, generated in response to this litigation, indicates that, between January 1, 1995 and November 14, 2000, approximately sixteen thousand (16,000) administrative disciplinary proceedings were instituted base upon the alleged delivery of alcoholic beverages to persons under the legal age.[1] Under

[1] It is my understanding that plaintiffs contend that this number of administrative proceedings evidences that New York is "apparently not very effective in curtailing underage access" (Pl. Br. at 23). To the contrary, this number of disciplinary proceedings demonstrates the vigilance and effectiveness of the SLA in its ongoing and aggressive enforcement efforts to lower the incidence of underage drinking. Nor would I wish to contemplate how many more illegal sales to minors would occur (with the resulting devastating and often tragic consequences) in the absence of the vigilance of the SLA in strictly enforcing the ABC Law.

New York law, an alcoholic beverage may not be sold to any person under 21 years of age. In 1999 alone, the SLA imposed 2,437 penalties against licenses in connection with the sale of alcoholic beverages to minors. *See* 1999 SLA Annual Report at 7. Also in 1999, the SLA obtained a grant of $220,000 to establish college/community alliances to address the problem of excessive drinking by college students. *See* 1999 SLA Annual Report at 7. in 2000, for the sixth consecutive year, the most frequent violation of the ABC Law was selling alcoholic beverages to minors. In 2000, 2,025 charges were sustained. *See* 2000 SLA Annual Report at 14. Also in 2000, the SLA issued Certificates of Approval to three training programs, which are regularly providing instruction to retail licensees and their employees pursuant to the Alcohol Training Awareness Program developed by the SLA. During the first year of the program, 167 classes were conducted, with 1,611 employees completing this program. *See* 2000 SLA Annual Report at 16.

38. The type of alcoholic beverage traffic the State elects to permit within its borders is exclusively a matter of Legislative discretion. The ABC Law establishes the types of alcoholic beverage traffic the State will allow by providing for specific kinds of licenses, defining the scope of each license privilege and setting forth the restrictions and conditions which accompany each license privilege.

39. The only commercial alcoholic beverage traffic allowed in New York is that traffic expressly provided for in the various types of license privileges the Legislature defines in the ABC Law. While one might conceive of a type of commercial alcoholic beverage enterprise in

which one might desire to engage (direct shipment from an out-of-state manufacturer to a New York consumer, for example), if the Legislature has not made provision for that type of business, then such business is not allowed in New York.

40. In this regard, until 1964 the conduct of a tavern business or the operation of a cocktail lounge was not allowed in New York State. A tavern could not be operated because the ABC Law made no provision for a tavern license, and the manufacture or sale of alcoholic beverages is forbidden unless one has been issued the appropriate license. Prior to 1964, a restaurant liquor license (and variants thereof) was the only license that authorized a person to engage in the sale of liquor for consumption on the premises (ABC Law § 64). Only after enactment of ABC Law § 64-a (Laws 1964, ch. 531) has the conduct of a tavern been allowed. Thus, the establishment of a new or different license type is a matter within the scope of the Legislature's discretion. A judicial decision such as that sought by the plaintiffs here (which would, in effect, create a new license never contemplated or authorized by the State Legislature) would run afoul of the State Legislature's function.

41. For example, one may consider a person's desire to establish a business devoted exclusively to the sale of packaged beer at retail for consumption off-premises. The ABC Law currently makes no provision for the grant of such a license. In order to obtain a license to sell packaged beer at retail for consumption off-premises, a person is required to operate a grocery or drug store business (ABC Law § 54(4)).

42. As another example, a person might contemplate selling pints of liquor or wine door-to-door. Although Girl Scouts may freely go door-to-door selling cookies, the door-to-door sale of liquor or wine cannot be undertaken without a license which specifically authorizes that type of selling. No such license exists, and therefore such door-to-door sales of liquor or wine cannot be undertaken. In point of fact, the ABC Law specifically forbids any retail licensee from peddling liquor or wine door-to-door, where both the agreement-to-sell and the delivery are concurrently made at the residence or business of the consumer (ABC Law § 102(4)).

43. In the instant litigation, the plaintiffs seek to engage in a business – the direct shipment of wine from out-of-state wineries to New York consumers – which is not allowed under the ABC Law. The ABC Law does, however, provide for a winery license (ABC Law § 76). While, to my knowledge, no out-of-state winery has applied for a winery license, the language of the statute does not foreclose an out-of-state winery from doing so and obtaining such a license.[2] To be eligible for a winery license, the winery must maintain a branch office and a warehouse in New York (pursuant to a warehouse permit under ABC Law § 96); upon the submission of satisfactory applications, an out-of-state winery may be issued a winery license and warehouse permit for,

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[2] Indeed, the definition of "winery" (ABC Law § 3(37)) "includes a winery for the manufacture of wine *in any state other than New York state* and which has and maintains a *branch . . . office or storeroom within the state* of New York," thereby expressly including an out-of-state winery within the ABC Law definition. (Emphasis added).

respectively, the branch office and warehouse which the out-of-state winery maintains in New York State; the licensed out-of-state winery is authorized to receive and possess wine from *other* states consigned to its State-permitted, United States government bonded warehouse located within the State (ABC Law § 77(1)); the licensed out-of-state winery is authorized to sell from the State-permitted warehouse premises – to a licensed wholesaler or retailer, or to a corporation operating railroad cars or aircraft for consumption on such carriers – wine manufactured by the licensee *or* received by the licensee from any other state in the original sealed containers of not more than fifteen gallons each (ABC Law § 77(1)); the licensed out-of-state winery is eligible to apply for a certificate authorizing such winery to *sell wine at retail in sealed containers to a householder* for consumption in his home (ABC Law § 77(2)); and that out-of-state winery may deliver alcoholic beverages from its State-permitted warehouse to a common carrier licensed by the State to engage in the commercial transportation of alcoholic beverages, and have the licensed common carrier deliver the alcoholic beverages to a purchaser for purposes of consumption (ABC Law § 116). Alternatively, an out-of-state winery that does not desire to hold the required New York State licenses and permits available to it to be a "winery" under the ABC Law (with all of the attendant privileges) may approach New York State licensed wineries and wine wholesalers and arrange for the distribution of its product through established and State-regulated commercial channels. Another option available to an out-of-state winery is to obtain a wine wholesaler's license itself pursuant to ABC Law § 78(1).

44. If out-of-state wineries, such as the plaintiffs here, are permitted to sell and ship directly to New York consumers – without any license – the SLA will lose the ability to investigate and control such shipments, to protect against diversion of wine to unlawful purchasers (such as minors below the drinking age) and to insure that alcoholic beverages sold in this State are not adulterated.

45. Finally, it is my understanding that plaintiffs are challenging ABC Law § 102(1)(a) on the grounds that this statutory provision constitutes a blanket prohibition against an unlicensed winery sending information and advertising about its wines into the State. In particular, plaintiffs claim that ABC Law § 102(1)(a) prohibits an unlicensed winery from making its website available to persons in New York. Plaintiff's interpretation of this statutory provision is *not* that of the SLA's. Rather, the SLA has interpreted this statute to prohibit only the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed producers or sellers. The SLA has never interpreted this provision as prohibiting a party such as an unlicensed out-of-state winery from advertising its products. Indeed, it is my understanding that § 102(1)(a) has been upheld as a constitutional exercise of state power in *House of York v. Ring*, 322 F.Supp. 530, 531, 533 (S.D.N.Y. 1970), where the Court held that the effect of the statute was to prevent a mail order wine and liquor solicitation service "from sending its *solicitations or order forms* into the State of New York unless it is licensed."

/s/ Thomas G. McKeon
Thomas G. McKeon

Sworn to before me
this 17 day of August, 2001

/s/ Joyce A. Rosario
Notary Public
JOYCE A. ROSARIO
Notary Public, State of New York
No. 01RO46301.50
Qualified in Kings County
Commission Expires Jan. 31, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

DECLARATION OF FREDERICK P. SCHAFFER IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Dated August 17, 2001

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1. I am the Vice Chancellor for Legal Affairs and the General Counsel to the Board of Trustees of the City University of New York. I make this declaration, based on my personal knowledge and review of the attached exhibits, in support of defendants' cross-motion for summary judgment and in opposition to plaintiffs' motion for summary judgment.

2. I submit this declaration on behalf of the City University of New York, the State University of New York, Fordham University, and St. Francis College (collectively, the "*amici*") – all New York State universities and colleges that support this State's ban on direct shipment of alcoholic beverages from out-of-state suppliers to New York consumers. The *amici* agree that abstinence is the appropriate choice for certain segments of the population, particularly for those under the legal minimum drinking age of 21; that the sale and distribution of alcoholic beverages should be strictly controlled, as the New York State Liquor Authority has historically done in this State; and that evisceration of current State laws that prohibit and

prevent out-of-state direct shipping to New York consumers will necessarily lead to increased underage drinking.

3. The *amici* include more than 90 schools attended by more than 550,000 students, many, if not most, of whom are under the legal drinking age of 21, have some level of computer and Internet skills, and can gain access to credit cards.

4. From the *amici*'s perspective, the prospect of direct shipment of alcoholic beverages, whether it be through the Internet, mail-order, or 800-numbers, raises several significant concerns. In general, it would permit drinkers easier access to alcoholic beverages and, thus, facilitate more underage drinking. Moreover, increased alcohol use would cause both immediate and long-term harms.

5. Specifically, the availability of ordering alcoholic beverages over the Internet increases the risk of underage drinking on college campuses. As the organization, Americans for Responsible Alcohol Access ("ARAA"), has stated:

> With direct shipping, teens don't have to worry about risks associated with purchasing from local outlets. No longer do they have to forge fake ID's and chance getting caught and arrested for buying alcohol at a store monitored by the police. All they have to do is dial a toll-free number or log on the Internet and mouse-click "Yes" to the question of whether they are of age. They can pay by credit card or even the new checking account debit cards which function much the same as a credit card. Indeed, most students go off to college these days with a credit card, yet most are not of legal drinking age until their junior year. Delivery truck drivers are not in the

> business of checking ID's – and in any case many direct shippers don't label their packages or intentionally list contents deceptively, such as "olive oil."

Fact Sheet: Underage Access Resulting From Direct Shipping of Alcoholic Beverages, (Americans for Responsible Alcohol Access), at 1-2 <http://www.araa.org> (visited July 27, 2001) (hereinafter "*Fact Sheet*") (a true and correct copy of a printout from which is attached hereto as Exhibit 1).

6. Alcohol abuse poses a serious threat to the health and welfare of affected college students and to the safety of college campuses. That is why, each year, many colleges and universities throughout New York State, including some of the *amici* here, devote resources to education, intervention and prevention efforts relating to alcohol abuse. Unlimited and unregulated access to alcohol through the Internet, mail-order or 800-numbers will only exacerbate the challenges faced by our State's colleges and universities in their attempts to address the health and safety problems caused by alcohol abuse.

7. The *amici* seek to bring to the Court's attention the social and public health consequences that will likely result if the Court strikes down New York's "three-tier" system, thereby permitting the direct sale and shipment of alcoholic beverages from unlicensed out-of-state producers to New York consumers. The expanding use of the Internet has given unlicensed out-of-state producers and sellers of wine, beer and hard liquor an opportunity never before possible to circumvent New York's alcoholic beverage control laws.

8. Unlike out-of-state producers and sellers of alcoholic beverages who are beyond the jurisdiction of New York State regulations, in-state entities licensed by the State Liquor Authority to traffic in alcoholic beverages face civil and criminal sanctions if they fail to comply with New York's alcoholic beverage control laws, including monetary penalties and license suspension or revocation.

9. Moreover, although this case purports to address only wine, the relief that plaintiffs seek would result in the abrogation of New York's entire "three-tier" system of alcoholic beverage distribution. Thus, should plaintiffs prevail, beer and hard liquor, in addition to wine, would also be able to be shipped directly to New York consumers. Accordingly, any analysis of the potential harms that will occur from direct shipments by unlicensed sources should take into account all alcoholic beverages, not just wine.

10. If the requirement that all out-of-state alcoholic beverages be imported through in-state licensed wholesalers were to be struck down, the practical means of enforcing the regulations would be lost, and any unlicensed out-of-state producers or sellers of alcoholic beverages would be able to sell to minors with impunity. Indeed, these out-of-state sellers could not be held legally accountable for making beer, wine and hard liquor readily available to minors, whose use of the Internet and other means would permit them to circumvent the legal restrictions applicable to them.

11. Under New York law, licensees are liable for the sale of alcoholic beverages to minors. Accountability is essential. It is already difficult enough to enforce the minimum legal drinking age. The current direct shipping ban, however, draws a bright line, over which responsible

parties and common carriers will not cross. Thus, eviscerating the direct shipping ban will blur that bright line and, thus, exacerbate the problem of underage drinking and other social ills.

Underage Alcohol Use And Abuse

12. Recent studies have noted disturbing levels of underage alcohol use and abuse. According to those studies, 54% of 8th graders, 72% of 10th graders, and 82% of 12th graders report having consumed alcohol. *See* Patrick M. O'Malley, et al., *Alcohol Use Among Adolescents*, 22 ALCOHOL HEALTH & RES. WORLD 85, 86 (1998) (a true and correct copy of which is attached hereto as Exhibit 2). The conclusions are grim: "[A]lcohol use and abuse, as well as alcohol-related problems, continue to be highly prevalent among American youth and a major source for concern. In fact, excessive alcohol use and its associated problems appear to have increased in recent years, following an earlier period during which both the rates of heavy drinking and the incidence of driving after drinking declined." *Id.* at 91.

13. These troublesome patterns continue, and grow worse, as young people move from adolescence into early adulthood, from high school into college. Indeed, according to a national study, young adults aged 18 to 20 had the second highest prevalence of heavy drinking among all age groups and the highest rate of alcohol dependence among all age groups. *See* Summary of Findings from the 1999 National Household Survey on Drug Abuse, (Department of Health and Human Services, Substance Abuse and Mental Health Services Administration) (1999) (a true and correct copy of which is attached hereto as Exhibit 3).

Drinking On College Campuses

14. Although most college students are underage, "alcohol remains widely available – and highly promoted – to students of all ages." Adam Cohen and Greg Fulton, *Battle of the Binge*, TIME, September 8, 1997, at 1 (a true and correct copy of which is attached hereto as Exhibit 4). In fact, "from the moment freshmen set foot on campus, they are steeped in a culture that encourages them to drink, and drink heavily." *Id.* at 2.

15. According to statistics compiled by Mothers Against Drunk Driving ("MADD"), college students spend $5.5 billion on alcohol each year, more than they spend on soft drinks, tea, milk, juice, coffee, or school books combined. *See Underage Drinking Information Parents Need to Know, College Statistics*, (Mothers Against Drunk Driving), at 2. <http://www.madd.org/under21/youth_issues.shtml> (visited July 27, 2001) (a true and correct copy of a printout from which is attached hereto as Exhibit 5). MADD makes a "conservative" estimate that American college students drink over 430 million gallons of alcohol a year – the equivalent of 3,500 Olympic size swimming pools. *Id.*

16. College and university administrators face significant obstacles in attempting to prevent alcohol abuse on their campuses. College students have considerable autonomy. Underage students are surrounded by other students who are over 21 and may be willing to help them get alcohol. Various media, including films and music, reinforce the idea that excessive drinking is a rite of passage for college students. Thus, school administrators, who care deeply about the health and well-being of

their students, need all the help that our laws can give them in attempting to meet these challenges.

Marketing Of Alcoholic Beverages To Minors

17. Studies show that, despite voluntary industry code provisions that prohibit it, the Internet is used extensively to market alcohol and the culture of alcohol use to young people, including adolescents. These sophisticated marketing tactics contribute to minors' attitudes, values and preferences in making decisions about alcohol.

18. One of the first studies to explore the Internet marketing of alcohol and tobacco to minors was done by the Center for Media Education (CME) and reported in March 1997. *See Alcohol and Tobacco on the Web: New Threats to the Youth, Executive Summary*, (Center For Media Education), March 1997, at 1, <http://www.cme.org/children/marketing/execsum.html> (visited July 27, 2001) (a true and correct copy of which is attached hereto as Exhibit 6). That study found that:

> [A]lcohol and tobacco companies are using the online media to advertise and promote their products, through a variety of marketing techniques that capitalize on the medium's strong and unique attraction for young people.
>
> These campaigns are being launched at a time when drinking and smoking among youth are at alarmingly high levels. Underage drinking and smoking are already a major public health problem in the U.S. Alcohol is a factor in all leading causes of death for young people ages 15 to 24.

Id. at 1. That study also found that many websites marketing alcohol "are designed to take advantage of the

unique properties of the interactive online media. Many of these techniques are particularly appealing to children and youth." *Id.*

19. In December 1998, CME published an update to its original study. *See Alcohol Advertising Targeted at Youth on the Internet: An Update*, Center For Media Education, December 1998 <http://www.cmc.org/publications/alcohol_tobacco/alcrep.html> (visited July 27, 2001) (a true and correct copy of which is attached hereto as Exhibit 7). The update examined a total of 77 beer, wine and spirits websites. *Id.* at 1. It identified elements that were considered to appeal to youth and found that 62% of the sites included at least one such element, with the typical site having at least three such elements. *Id.* at 2. The study noted:

> Individually, some of these techniques do not necessarily indicate an appeal to youth. However, when used in combination – as they usually are – children can be kept at a site for hours and persuaded to return time and again. It is in this way that companies are able to build a long-term relationship with young people. The sites that appear to appeal to youth often strive to create a community of brand-loyal enthusiasts, a place where lonely teens can talk, find peers and support for risky activities like binge drinking. Known among marketers as "relational" advertising, this effort to build a relationship between the user and the product is the dominant trend in marketing on the Web and is already heavily exploited by the alcohol industry.

Id. at 2-3.

20. Overall alcohol consumption in the U.S. peaked in the early 1980s, then began a steep decline, particularly among distilled spirits. Indeed, between 1987 and 1997, average annual consumer expenditures on alcoholic beverages dropped 24 percent. U.S. Wine Demographic Report, MKF Research Group at 7 (2000) (a true and correct copy of which is attached hereto as Exhibit 8). Nevertheless, in contrast to other alcoholic beverages, wine volume grew 30 percent over the past two decades. *Id.* at 9. Moreover, as the MKF Research Group recently reported, "some experts believe that this overall decline [in alcohol sales] is reaching an end and that an increase in the number of drinking-age youths is just around the corner as the children of Baby Boomers come of age, creating a 'baby boom echo.'" *Id.* at 7.

21. As opposed to distilled spirits, wine consumption was buttressed, even during this period of declining overall alcohol sales in the 1980s, by the emergence of non-traditional wine-based products generally classified as "wine coolers." During the decade of the 1980s, "wine coolers" were particularly popular with women, including underage girls. These sweet-tasting, low-alcohol drinks made from fruit juice and low-quality wine came on the market almost by accident. *See Wine*, 18 BOTTOM LINE ON ALCOHOL SOC'Y 105, 105-111 (1997) (a true and correct copy of which is attached hereto as Exhibit 9).

22. Considering the entry-level market for alcoholic beverages, low-alcohol, sweet-tasting drinks are a natural bridge for young people from soft drinks. Hoppers Hooch, Two Dogs Lemonade and similar malt-based products offer vintners an ability to appeal to the underage market, as "wine coolers" have. These drinks could easily be marketed to underage teens through the Internet. *See California*

becomes the battleground for Alcopops – TGIF, Hooper's Hooch and more . . ., 17 BOTTOM LINE ON ALCOHOL SOC'Y 40, 40-46 (1996) (a true and correct copy of which is attached hereto as Exhibit 10).

23. Many of the Internet wine sites contain links to "favorite sites" that take the reader directly to youth-oriented wine sites. An example is an electronic magazine, *Wine X Wired*, with features such as "Sex, Wine & Rock n Roll." *See* Wine X Wired, <http://www.winexwired.com/toc.htm> at 4 (visited July 27, 2001) (a true and correct copy of a printout from which is attached herein as Exhibit 11). In content and format this website is an appeal to youths.

24. Moreover, studies show that most youths who drink do not limit themselves to one beverage but, rather, tend to consume beer, wine and spirits. *See* Stephen Hansell, et al., *Specific Alcoholic Beverages and Physical and Mental Health Among Adolescents*, 60 J. STUD. ALCOHOL 209, 209-217 (1999) (a true and correct copy of which is attached hereto as Exhibit 12).

25. Nor does there seem to be any practical means to shield youths from this concentrated Internet appeal. An October 1999 CME study focused on the ability of filtering and rating technologies to screen promotional alcohol and tobacco content and found them to be extremely ineffective. *See Youth Access to Alcohol and Tobacco Web Marketing, The Filtering and Rating Debate*, (Center For Media Education), October 1999, <http://www.cme.org./publications/reports/html> (visited on July 27, 2001) (a true and correct copy of which is attached hereto as Exhibit 13).

26. Among the classes of alcoholic beverages, wine has taken leadership from distilled spirits and malt beverages on the Internet as the only advertiser among the top 100 in Dot-com ad spending, according to a leading advertising trade publication. *See Advertising Age*, at 26 (September 25, 2000) (a true and correct copy of which is attached hereto as Exhibit 14). For example, *Wine.com* increased its offline media advertising to call attention to its products available online from $392,800 in the January-June 1999 period, to $5,090,900 for the July-December 1999 period, to $6,640,700 for the first six months of 2000. *Id.*

27. Internet marketing to youth, if coupled with direct shipments of alcohol from unlicensed out-of-state suppliers, could have devastating consequences because of the practical problems in preventing such sales to minors. The December 1998 CME update study addressed the inadequacy of age verification in alcoholic beverage Internet sites and found:

> Forty-four percent (44%) of the analyzed Web sites made some kind of statement regarding the required age to enter the site. Most of the time these proved to be ineffective barriers, as one need only be able to subtract 21 from the current year to bypass the requirement. Or, more commonly an underage visitor might put in her real age, be blocked from entering the site, only to hit the "back" button, do the math and then enter successfully.

Exhibit 7 at 6.

28. One recent study, while not dealing specifically with Internet sales, examined the greater availability of alcohol to underage drinkers. *See* Linda A. Fletcher, et. al.,

Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers, 61 J. STUD. ALCOHOL 81, 81-84 (2000) (a true and correct copy of which is attached hereto as Exhibit 15). That study included surveys of high school seniors and persons age 18-20.

29. The authors of that study noted the reason why remote purchases of alcohol are particularly attractive to young people:

> Alcohol home delivery services are a unique form of alcohol availability in that the sale occurs privately, away from commercial outlets, making it less likely to be observed by other customers, outlet management surveillance cameras or enforcement agents . . . Young people may feel more comfortable attempting to buy alcohol in unmonitored home-delivery settings, believing they are less likely to be caught making an illegal alcohol purchase. Young people's perceptions about the level of risk involved in obtaining alcohol may affect their use of certain sources for alcohol.
>
> * * *
>
> An unexpected finding was that 12th graders were significantly more likely than 18- to 20-year-olds to have purchased delivered alcohol, possibly because older drinkers may be able to more easily make direct alcohol purchases at an outlet.

Id. at 81, 83.

30. The authors of that study concluded that home delivery is one of a number of sources of alcohol for underage drinkers:

> Knowledge of the sources of alcohol to underage drinkers is an important step in developing policies that help reduce youth alcohol access and resulting injuries, violence and social problems. Placing restrictions on or more closely monitoring home deliveries of alcohol may be part of a larger set of policies that need to be implemented. Policy measures that target alcohol sales via delivery may particularly affect younger drinkers and those at risk for alcohol-related problems.

Id. at 84.

31. While discussion there centered around home delivery resulting in easier access for underage drinkers, a related study showed the impact of these sales on another segment of the "at risk" population: severe alcoholics or problem drinkers unable to get alcohol by conventional means. This study concluded that the easier access provided by home delivery is similar to the easier access offered by online purchasing. *See* Alexander Wagenaar, *Home Delivery of alcohol to youth and problem drinkers*, 19 BOTTOM LINE ON ALCOHOL SOC'Y 33, 33-48 (1998) (a true and correct copy of which is attached hereto as Exhibit 16).

32. Researchers examined the experience of patients who were participating in a specialized treatment program for severely medically ill alcohol dependent patients. The Alcohol Related Disorders clinic at the Minneapolis VA Medical Center involved family and community resources whenever possible to manage behavior of those suffering from serious medical complications from drinking such as alcoholic cirrhosis, alcoholic hepatitis, upper gastropomtestoma, bleeding and alcoholic cardiomyopathy. *Id.* at 38-41.

33. The treatment program involved efforts to cut off or reduce the patient's access to alcohol. The researchers concluded:

> Such efforts are sometimes hampered when patients, especially those who are too sick or debilitated to get alcohol in more conventional ways, resort to alcohol home delivery services to obtain alcohol. Through home delivery these patients are able to continue drinking and risk worsening already life-threatening medical problems despite the efforts of family and clinical staff.

Id. at 39.

34. In New York, the policy measures mentioned in the Fletcher study are reflected in the licensing and regulations that are part of New York's "three-tier" system. *See* Exhibit 15. They will be largely undone if the plaintiffs' requested relief is granted in this case. Unlicensed out-of-state sellers are not accountable to the State Liquor Authority, and their sales activities may even go undetected. Without the accountability mechanism of licensing, which includes the ability to demand compliance by the threat of license suspension or revocation or substantial monetary penalties, these controls will be virtually unenforceable against out-of-state sellers. The result will be an open pipeline to every college dorm room with an Internet connection and to every adolescent drinker with computer and credit card access.

The Adverse Effects Of Greater Access For Youth To Alcoholic Beverages

35. At hearings on interstate alcohol sales before the U.S. Senate Judiciary Committee on March 9, 2000,

witnesses testified that "[o]ne of the strongest -- and most universally accepted – justifications for controlling the sale of alcohol is to prevent consumption by minors." *Interstate Alcohol Sale and the Twenty-First Amendment: Hearings on H.R. 1063 Before the Senate Judiciary Committee*, 106th Cong. J-106-7, at 28 (1999) (Statement of Wayne Klein, Assistant Attorney General, State of Utah). To paraphrase the statement of one law enforcement official:

> Direct shipments of alcohol, whether purchased by internet, mail order or telephone, make it significantly easier for underage drinkers to obtain alcohol by eliminating the face-to-face contact between buyer and seller which facilitates age and identity determinations. As noted above, internet order forms may inquire about age, but there is no verification;
>
> Age verification at the time of delivery is ineffective because direct shippers often fail to identify the seller on the package or that the package contains alcohol, and do not state that an adult signature is required for delivery;
>
> A criminal investigation of a beer seller revealed that of 558 cases of alcohol delivered to Utah residents by the seller during a three-month period, 330 simply were left at the delivery site without any human recipient, much less the signature of an adult.

Id. at 28-29; *see also id.* (Statement of Senator Orrin Hatch (R-Ut.) at 1-3; Statement of Congresswoman Juanita Millender-McDonald (D-Ca.) at 9-12; and Statement of Congressman Robert L. Ehrlick, Jr. (R-Md.) at 7-9) (true and correct copies of which are attached hereto as Exhibit 17).

36. The impact of permitting direct sales by unlicensed sellers or producers is illustrated in a survey of college students. That survey revealed that:

- 68% (598,400 students nationally) of currently enrolled college students report that they drink beer, wine and/or liquor;
- 62% of college freshmen report drinking beer, wine and/or liquor;
- 59% of college students under age 21 report drinking beer, wine and/or liquor; and
- 80% of all students say their peers are likely to purchase alcohol on-line if age verification is not enforced.

See Memorandum from Mike Dabadie of Wirthlin Worldwide to Americans for Responsible Alcohol Access, at 1-2 (March 27, 2000) (a true and correct copy of which is attached hereto as Exhibit 18). Asked whether they would be likely to purchase alcohol over the Internet if no age verification were enforced, 35% of all students under age 21, 39% of freshmen, and 47% of male students under age 21 responded that they would likely make alcohol purchases under these circumstances. *Id.*

37. In that same survey, 17% of college students responded that they are aware of on-line purchasing, 2% have actually purchased over the Internet, and 5% know someone who has purchased over the Internet. *Id.* at 3. In terms of Internet access generally, 99% of college students report having access to the Internet. *Id.* at 1. Moreover, forty-six percent (46%) of Internet-connected households have children under age 18 at home. *Id.*

38. As that survey confirmed, the Internet represents a significant untapped market for alcohol sellers, including wineries. Thus, faced with increased enforcement efforts at retail locations, underage drinkers are likely to turn to the Internet, mail order or toll free calling for their alcohol purchases. *Id.* at 3.

39. Permitting direct interstate sales to New York consumers by out-of-state wineries will result in alcohol being more readily available to underage drinkers and increased levels of consumption. Studies correlate higher availability of alcohol with higher rates of consumption. *See* Alexander C. Wagenaar, *Minimum Drinking Age and Alcohol Availability to Youth: Issues and Research Needs,* in 25 ECON. & PREVENTION ALCOHOL-RELATED PROBS., 175, 176-94 (Hilton and Bloss eds. 1993) (a true and correct copy of which is attached hereto as Exhibit 19); Traci Toomey et. al., *Policy-Alcohol*, 3 ANN. REV. ADDICTION RES. TREATMENT 279, 281 (1993) (a true and correct copy of which is attached hereto as Exhibit 20); Paul J. Gruenwald, et. al., *The Relationship of Outlet Densities to Alcohol Consumption: A Time Series Cross-sectional Analysis*, 17 ALCOHOLISM CLINICAL EXPERIMENTAL RES. 38, 38-47 (1993) (a true and correct copy of which is attached hereto as Exhibit 21).

40. Also of note, if out-of-state suppliers are able to bypass New York taxes, the resulting lowered price will tend to increase the level of consumption by minors. Studies correlate higher cost with lower consumption of alcohol, particularly among minors, just as higher cost discourages use of tobacco products, especially by minors. *See* Exhibit 20 at 280-81.

41. The National Highway Traffic Safety Administration has estimated that between 1975 and 1995, 15,667 lives were saved by raising the Minimum Legal Drinking Age (MLDA) from 18 to 21. *See Youth access to alcohol continues as public policy issue with renewal of the debate on minimum drinking age laws*, 19 BOTTOM LINE ON ALCOHOL SOC'Y 137, 141 (1998) (a true and correct copy of which is attached hereto as Exhibit 22).

42. In addition, researchers found that the problems of suicides, hospital admissions, pedestrian accidents and vandalism decreased as a result of reduced underage drinking after the MLDA was raised from 18 to 21. *Id.* at 141-42.

43. Nevertheless, alcohol-related problems have persisted among youth since the change in the MLDA. *See* LLOYD D. JOHNSTON, ET. AL., U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SMOKING, DRINKING, AND ILLICIT DRUG USE AMONG AMERICAN SECONDARY SCHOOL STUDENTS, COLLEGE STUDENTS, AND YOUNG ADULTS, 1975-1991, at 15, 18, 19 (1992) (a true and correct copy of which is attached hereto as Exhibit 23).

44. According to the most comprehensive examination of drinking problems among young people yet on record, the National Institute on Alcohol Abuse and Alcoholism (NIAAA) concluded that the younger the age of drinking onset, the greater the chance that an individual at some point in life will develop a clinically defined alcohol disorder, which was defined as either alcohol abuse or alcoholism. *See* Bridget F. Grant, *Age At Smoking Onset And Its Association With Alcohol Consumption And DSM-IV Alcohol Abuse And Dependence: Results From The National Longitudinal Alcohol Epidemiologic Survey*, 10 J.

SUBSTANCE ABUSE 60 (1998) (a true and correct copy of which is attached hereto as Exhibit 24).

45. That study concluded that young people who began drinking before the age of 15 were four times more likely to become alcoholics than those who began drinking at the legal age of 21. *See The Legal Drinking Age*, Monday Morning Report (Alcohol Research Information Service, Lansing, Michigan), February 16, 1998, at 2 (a true and correct copy of which is attached hereto as Exhibit 25). Moreover, researchers found that a person who began drinking before age 15 was twice as likely to experience alcohol abuse problems than someone who began drinking at 21. *Id.* NIAAA researchers defined alcohol abuse as "a maladaptive drinking pattern that repeatedly caused life problems." *Id.*

46. The consequences of alcohol abuse by young drinkers are serious and too often fatal. Alcohol has been identified as a major factor in accidents, homicides, and suicides, which are the three leading causes of death among 15- to 24-year-olds. *See* 1995 Report of the Center for Disease Control, as cited in *Facts: Underage Drinking* (a true and correct copy of which is attached hereto as Exhibit 26).

47. Researchers have also found that people who began drinking while underage are much more likely to get hurt in car crashes or suffer injuries in a wide variety of alcohol-related accidents, while walking, swimming, boating or engaging in other activities of daily living, particularly when under the influence of alcohol. *See* Ralph W. Higginson, et. al., *Age of Drinking Onset and Unintentional Injury Involvement After Drinking*, 284 Journal of the American Medical Association 1527, 1527-1533 (2000) (a

true and correct copy of which is attached hereto as Exhibit 27).

The Threat To Our State's College Students From Internet Access To Alcohol In The Absence Of A Direct Shipping Ban

48. Internet sites that facilitate the sale and direct shipment of alcohol products will only aggravate this country's underage drinking problem. As witnesses testified before the Senate Judiciary Committee, "the access to alcohol by underage drinkers increases once they arrive on college campuses, where the Internet serves as a stronger role in their education." *See* Exhibit 17 at 11 (Statement of Hon. Juanita Millender-McDonald). As previously noted, some of the *amici* have undertaken efforts to educate their students about the dangers of excessive drinking, and Internet sites that do not check the age of the purchaser or limit the amount that can be purchased can only undermine these ongoing efforts. *See e.g.*, <http://www.internetwines.com> (visited July 27, 2001) (showing that for eighteen dollars one can order a bottle of 192 proof grain alcohol) (a true and correct copy of a printout from which is attached hereto as Exhibit 28).

49. College students are among the most prolific and sophisticated users of the Internet. A study conducted by Rensselaer Polytechnic Institute concluded that 28% of all Internet users are full-time college students. *See* Keith J. Anderson, *Internet Use Among College Students: An Exploratory Study*, at 2, <http://www.rensselaer.edu~anderk4/research.html> (visited July 27, 2001) (a true and correct copy of a printout from which is attached hereto as Exhibit 29). This figure reflects the high percentage of colleges and universities that have an Internet presence,

that provide Internet access free of charge, and that have Internet connections in residence hall rooms or available on campus 24 hours per day. *Id.*

50. Today's cyber-savvy underage college students can easily order alcohol over the Internet and have it delivered to their homes or college dormitories. As previously explained, "[a]ll they have to do is . . . log on the Internet and mouse-click 'Yes' to the question of whether they are of age." Exhibit 1 at 2 (*Fact Sheet*).

51. That underage college students will avail themselves of this opportunity is a certainty. In a survey released in May 2000, nearly 18,000 college students said that they had already purchased alcohol on the Internet or from catalog or toll-free phone services, and, "an astonishing 89 percent of freshmen said that their peers would be likely to purchase alcohol over the Internet if no age verification were required, especially since most college students are not of legal age (21) until their junior or senior year." *See Eighty Percent of College Students Say Peers Likely to Purchase Alcohol Online*, 17 BEER PERSP. (Nat'l Beer Wholesalers Assoc.), May 8, 2000, at 2, <http://www.nbwa.org/inex2.html> (visited July 27, 2001) (a true and correct copy of a printout from which is attached hereto as Exhibit 30).

52. To promote temperance and prevent alcoholic beverages from reaching minors, the State must be permitted to continue to control alcohol distribution and to have the authority to limit it to licensed sellers who can be held accountable if they do not strictly comply with New York's alcohol beverage control laws. This Court should therefore uphold New York's "three-tier" system, which insures that those who sell alcohol to New Yorkers are

in-state licensed parties subject to State sanctions if they sell alcohol to minors.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 14, 2001.

/s/ Frederick P. Schaffer
Frederick P. Schaffer

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

Exhibit 16 to Declaration of Clint Bolick, executed on October 11, 2001, in support of Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, dated October 17, 2001 – Affidavit of Simon Siegl, sworn to on September 26, 2001

AFFIDAVIT OF SIMON SIEGL IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' AND INTERVENOR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CITY OF WASHINGTON)
) SS.
DISTRICT OF COLUMBIA)

Simon Siegl, being duly sworn, deposes and says:

1. I am an adult resident of Virginia. Since July of 1996 I have served as president of the American Vintners Association (AVA), a national trade association representing 680 winery members in 44 states. From 1985 to 1996, I served as executive director of the Washington Wine Institute, a trade association of wineries in that state.

2. I have reviewed the various submissions of the Defendants and Intervenors, including their brief, statement of facts, and affidavits. Those documents

contain numerous material factual errors and mischaracterizations that are addressed in this affidavit.

3. The issue of direct shipments from wineries to consumers has been a top priority during the sixteen years I have represented wineries through trade association management. It is through this direct experience that I supply the following information.

Introduction

4. The three-tier system is an efficient mechanism that serves the supplier, wholesaler and retail marketplace for distribution of wines supplied by domestic and imported brands that have the production capacity and other resources necessary to support the wholesaler tier as currently structured. It best serves – and its primary customers are – a small number of large volume, well-known brands. Since the inception of the three-tier system, however, the American wine industry and the interested wine consuming public have both changed dramatically.

5. Records of the Bureau of Alcohol Tobacco and Firearms, which licenses commercial wineries, show that there were 579 American wineries in 1975 and 2,188 for the year 2000, a growth of 278%. The three-tier system has not only been unable to service this growth in the supplier tier during this period, but has simultaneously experienced a dramatic consolidation of major wine wholesalers, resulting in a reduction of distribution channels available to wineries.

6. For most small wineries, with limited quantities of wine for sale, it is a daunting and near impossible task to obtain wholesaler interest in representation of their wines outside of their primary market. Even when they succeed in gaining representation, the costs imposed by an impractical system designed for a

different type of marketing make such representation futile. Meeting the needs and marketplace opportunities for both the supplier and consumer groups is the reason that AVA seeks to augment the three-tier system with additional market access.

Marketing by American Wineries

7. While about 50 wineries in the United States produce 90 percent of American wine, most wine producers are small, family run businesses that serve a relatively local market. There are now over 2,000 wineries located in forty-nine of the fifty states. Over 80% of wineries are truly cottage businesses which produce less than 25,000 cases per year, a quantity which could reasonably be marketed through their tasting rooms and a supplemental list of interested customers. Wineries with such small quantities are rarely of interest to large, broad-based distribution companies. These family wineries produce less than 3% of the total wine marketed in this country.

8. It is an important characteristic of the American wine market that a large percentage of purchasers seek distinctive, individualistic products representing differentiated growing and producing factors, rather than blended and fungible commodity type wines. This interest in distinctiveness is exemplified, in part, by the fact that *The Wine Spectator*, the largest circulation consumer-oriented publication, carefully reviews over 10,000 wines per year.

9. The American wine market comprises a wide range of products and price points. For instance, Cabernet Sauvignon, a common red wine variety, can sell for less than $2.00 per bottle (750 ml equivalent) to over $100 per bottle. It is that very diversity of products, produced in so many regions of the country, and with

so many marketing niches, which necessitates alternative mechanisms of marketing to ensure that American wineries are not handcuffed in how they may produce their products and forced into an indistinct conformity. For a variety of reasons, wine consumers often become loyal to particular wine offerings and wish to continue their relationship by purchasing those wines and sharing them with friends. In many ways a bottle of wine is a socially important "conversation piece".

10. A family winery ordinarily will use three-tier distribution for its wine in the state in which it is located and perhaps a couple of neighboring states where strong interest in the wine can be developed. But it is extremely rare for otherwise viable small wineries to have national distribution networks because they simply do not produce enough product to supply the needs of those wholesalers and because the cost of supporting the wholesaler is prohibitive.

11. Tourism is a driving force for most of the smaller wineries, which almost universally have on-site retail operations for their visitors. Through these tasting rooms a wide and diverse population is exposed to the products of craft wineries. Many visitors seek to continue that relationship even though they may reside in other states. Similarly, because America is made up of a very mobile population, many customers who have discovered and developed relationships with particular wineries while living in one state want to continue purchasing those wines after moving to another state.

12. Besides California, there are wineries without national distribution in North Carolina, Georgia, Missouri, Texas, Washington, Virginia and Oregon -- as well as New York – that are major tourist attractions and welcome from 50,000 to 700,000 visitors per year,

from almost all states. Yet none of these wineries have their wines in distribution in more than a handful of states. Because of restrictive laws in many states, including New York, it is impossible for wineries to fulfill the majority of orders from most out-of-state customers. In addition to the negative public relations implications, these lost sales opportunities diminish winery revenues and their ability to maximize potential growth.

The Nature of Selling Wine in the United States

13. Outside of the products of the 50 or 100 largest wineries, most wine is "hand sold." Advertising or mass brand identification is unheard of. Instead, such wine is sold through the knowledge and recommendation of members of the wine trade in direct, one-to-one contact with the person who is going to purchase and consume that wine. This fact points out, in a dramatic way, the limited influence of wholesalers on the marketing of wine. Their sales force never comes directly in contact with the ultimate customer. At best they help fulfill a sale made by a winery, a retailer or a restaurateur to a customer. In many cases the wholesaler actually impedes the sale by adding a layer of bureaucracy to the process of making this sale.

14. In most cases it is the winery that must impart the information and enthusiasm for a particular wine product to the customer either directly or by visiting retail stores and restaurants. That is why virtually all wineries employ a sales force that must make regular contact with their key retail stores and restaurants. For family wineries, that sales role is often the responsibility of the winery owner or winemaker.

Costs of supporting a wholesaler

15. A key element in any winery's decision to utilize a wholesaler is the cost of supporting that wholesaler. This is not primarily related to the approximately 30% typical markup that a wholesaler takes for its gross profit, even when it is doing little or nothing to produce sales. For a bottle of wine that sells for $20 at retail, the wholesaler takes about $3.00. Retailers receive about $6.50. The winery retains under $10 after transport and taxes are deducted. The critical factor in determination of whether to use a wholesaler is the cost of establishing and maintaining that channel.

16. As described above, in order to generate sales in New York, a winery owner or key employee has to make at least one trip a year into the New York marketplace to educate and motivate retail and restaurant personnel about the winery's products. This is expensive. To support sales of one hundred cases of wine in New York that trip might involve costs of $2,000 in time and about $3,000 in travel and entertainment expenses. These costs amount to over $4.00 per bottle, assuming the goal of selling 100 cases is achieved. Often one must invest that much money only to see sales of 20 to 50 cases.

17. The hard fact is that these support costs so erode any possible margin for a small winery that it can be a poor business decision to market to New York customers through the three tier system. By contrast, selling those 100 cases as 1,200 bottles to 1,200 loyal New York customers through direct marketing can probably be achieved at a cost of less than $1.00 per bottle, netting a winery $19 per bottle rather than $6.

"Push" versus "Pull" Marketing

18. Typical marketing and sales efforts by the supplier "push wine through the conventional three-tier system building inventory at both wholesalers and retailers while waiting for the consumer to purchase the product. After sufficient sales are made the wholesaler reorders from the winery to maintain inventory. Wineries have a unique capacity, however, to develop "pull" sales through direct contact with customers. Tourist visitors, wine club members, preferred customer groups, national media exposures, and other opportunities create the pool of qualified customers who know what product they want and can initiate the purchase directly from the winery. Advantages of pull marketing include a much more limited need for dispersed inventory development and much better alignment of product with actual sales.

19. AVA originated a "pull" marketing concept in 1992 to allow wineries to make the ultimate sale before the process of inventorying and transportation began. Consumer orders received and paid for would be fulfilled in full compliance with the three tier system by having the wine properly labeled and shipped through a wholesaler and retailer to the ultimate purchaser. AVA's concept was developed and then spun off in 1994 as an independent commercial enterprise known as Cellermasters of America. Cellermasters was designed to accommodate special orders from consumers in any location to all cooperating wineries. Cellermasters was purchased by Wineshopper.com in 1999.

20. Technical problems plagued the implementation of this plan from the beginning. State legislative and regulatory impediments like wholesaler "franchise" laws (which prohibit wineries from free movement between competing wholesalers), at rest laws (requiring shipments to be held at wholesaler warehouses for

one to three days), label approval requirements, price listing requirements and a general lack of motivation of wholesalers to handle special orders led to the demise of this approach in 2001.

21. In spite of wholesalers constantly citing to state legislatures that customers could order and receive any wine they want, virtually so wine was ever shipped and delivered within the constraint of the special order system developed as part of Cellermasters, "800" number services, Wineshopper.com or other wholesaler designed pull-marketing systems. Over the years considerable investments were made in these mechanisms, especially Wineshopper.com which was launched with $46 million in venture capital, as well as investments and commitments from wholesalers and their trade association.

22. Such a system could be effectively developed if there were competitive pressure on wholesalers to support it, make the necessary adjustments in their ways of doing business and support changes in state laws so that the products would flow smoothly to the customer. But there is not incentive to make investments and changes because the wholesalers have been able to obtain protective and anti-competitive legislation prohibiting direct shipment and eliminating any opportunity for effective competition through pull marketing.

23. A dramatic example of obstructionism is the passage, in 1997, of Florida HB 725 making it a felony to ship directly to Florida consumers and restricting who might obtain a wholesaler license. This legislation was characterized by Attorney General Robert Butterworth as legislation "[which allows the Florida alcoholic beverage industry] to tighten its vise grip on the distribution of alcoholic beverages. . . . [a bill which] is the perfect tool for the vested interests who

seek additional control over the marketplace, at the expense of competition and consumer choice. The legislation is anti-competitive, it is hostile to Florida consumers, and [it is] self protective." (May 17, 1997 letter from A.G. Bob Butterworth to Florida Governor Lawton Chiles recommending a veto of the legislation). It is almost as if the wholesalers working with friendly state legislatures, well greased with money, developed impediments to make it virtually impossible for wineries in other states to serve their customers without making unrealistic expenditures.

24. AVA worked hard to make a three-tier "pull marketing" scheme work. After formulating the idea of using the three tier system, AVA continued to support the concept to members. The association worked creatively for small quantity exemptions to restrictive state laws requiring wine be delivered and held at wholesaler premises, requirements for supplemental state label approval, long term commitments to particular wholesalers, wholesaler exclusivity laws and the like. Yet the wholesalers, who could easily use their political influence to erase those impediments, continue to choose the monopolistic approach of ignoring the demand and interest in special orders in favor of maintaining their comfortable status quo. Three tier "pull marketing" was a massive bureaucratic failure.

25. At the state level, wine is subject both to an excise tax based on gallonage and to sales/use taxes based on a percentage of the value of the product as would be applicable to any other consumer product. Much has been made about lost tax revenue which might arise from the interstate shipment of wine to New York consumers. Careful analysis suggests that these arguments are grossly overstated.

26. New York State taxes table wine at $0.19 per gallon, so each bottle is subject to an excise tax obligation of just under four cents per bottle. The excise tax on 100 cases of wine is approximately $45. AVA estimates that the maximum potential for out of state direct shipment of wine to be 0.5% of the total wine market, since the cost and trouble of purchasing in that manner makes it a very secondary avenue for selling or purchasing wine. At that level, and assuming the New York table wine market to be 40 million gallons per year (Adams Business Media, Handbook Advance 2001), New York would lose less than $40,000 per year in uncollected wine excise taxes *even if it did not collect a single penny of taxes on direct shipment through a permit system.*

27. Payments of use taxes for sales made outside the State of New York to New York residents are the responsibility of New York citizens. Underreporting of those taxes is rampant but there is no way to differentiate wine from any other products purchased out of state. The Congressional General Accounting Office (Sales Taxes, June 2000, GAO 00-165) has estimated that New York will lose between $0.5 and $2.4 billion per year in uncollected use taxes on remote sales of all types of goods by the year 2003. Nationally the estimate of uncollected use taxes suggests that these could amount to over $20 billion per year by 2003. Wine is a tiny portion of the potential loss. Using the AVA estimate of interstate shipment potential as 0.5% of total wine market, the $20 million represented by those sales generates a possible tax loss of $1.6 million or 0.11% of the average projected loss New York State might suffer due to uncollected use taxes.

28. But New York need not lose any revenue because of interstate direct shipment of wine. Several states including Nevada, New Hampshire, North Dakota,

Louisiana and Wyoming have chosen to establish a system for a direct sales permit where all taxes, including excise and sales taxes, are collected by the shipping winery and are remitted to the states in question. Another way to recapture virtually all of the potential lost revenue would be to solve the global problem of uncollected use taxes by establishment of a federal requirement for businesses to collect and remit those taxes as is currently being negotiated between state Governors and Congress (National Governors Association Policy EC-12).

Age Verification

29. Questions have been raised about the potential for underage persons using direct shipment as a means of obtaining alcoholic beverages. Underage consumption of alcohol does occur in this country but virtually all of the products so consumed originate within the three tier system and are purchased illegally by underage buyers or their surrogates.

30. It is well known that underage drinkers are not seeking out premium table wine, paying extra shipping charges and waiting a week or two for delivery. The likelihood of underage buyers taking the trouble, exposing themselves to discovery, leaving a documentary paper trail and paying the costs of home delivery by common carrier is very minimal, a fact confirmed time and again by regulators in states where direct wine shipment is commonplace, such as California and indeed New York. The Deputy Director of the Alcohol Beverage Control in California – where direct shipping has been legal for decades – provided written testimony to the U.S. Congress stating that direct shipping is not a source of underage access to wine, beer or spirits (March 3, 1999 letter from Manuel R.

Espinoza to Congressmen Thompson and Radanovich).

31. There is no evidence that direct shipment of wine, beer or spirits to underage buyers represents a significant regulatory problem even though 37 states, representing 81% of the country's population, including New York state, allow either interstate or intrastate delivery of either wine, beer or spirits. The Department of Health and Human Services estimates that more than half of 18-21 year olds drank alcohol in the month before their 1999 National Survey on Drug Abuse. Yet, outside of contrived and unrealistic "stings", there is virtually no evidence of underage persons receiving deliveries of wine, beer or spirits by common carrier.

32. It is typical for direct shipments of wine, beer or spirits to be labeled "adult signature required" (UPS). All the reciprocal shipment laws require such labeling. Some common carriers require the person receiving such shipments to present proof of age, which states may, of course, require. Most wineries require an affirmation of age on the part of the buyer before taking an order. In sum, direct shipment provides both opportunities for age verification as well as practical impediments to underage access, making it a highly unlikely means for minors to obtain alcohol.

Risks for Companies Selling Directly to Underage

33. Companies that violate direct shipment laws requiring proper labeling and other such precautions undertake severe risks to the continuation of their business. Violations can be prosecuted by authorities in the receiving states through long arm statutes (such as Utah vs. Beer Across America), through filing for injunctions in Federal Court under the 21st

Amendment Enforcement Act, though complaints lodged with the regulatory authorities in the states in which they are licensed and finally, for wineries, through initiation of regulatory action by the Federal Bureau of Alcohol, Tobacco and Firearms (Industry Circular 96-3, February 11, 1997), which can revoke their authority to produce wine.

Conclusion

34. While opponents argue that state interests such as concerns for lost revenue or underage access to alcohol might be considered in New York's policy towards interstate direct shipment of wine, the facts belie the significance of direct shipment contributing to the alleged regulatory and fiscal problems. Tax losses are de minimus and could easily be remedied through less proscriptive means. Similarly there is no evidence that the underage seek to turn to direct shipment of wine as a mechanism for obtaining alcohol. Adequate protections against that possibility are already in place and violations can be addressed through enforcement actions.

35. Meanwhile, because of the constraints of current statutes, New York citizens are discriminated against by the inability to obtain wines of their choosing, wineries through the country are unfairly excluded from interstate commerce with their customers in New York and, as a result, New York state wineries are excluded from reciprocal access to their consumers in other states.

/s/ Simon Siegl
Simon Siegl

Subscribed and sworn before me this 26th day of September 2001.

/s/ Notary Public,
State of Washington
District of Columbia

Notary Public
My Commission expires Sharon L. Brown

SHARON L. BROWN
Notary Public, District of Columbia
My Commission Expires July 14, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

Exhibit 22 to Declaration of Clint Bolick, executed on October 11, 2001, in support of Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, dated October 17, 2001 – Supplemental Affidavit of Juanita Swedenburg, sworn to on September 26, 2001

SUPPLEMENTAL AFFIDAVIT OF JUANITA SWEDENBURG IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' AND INTERVENOR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CITY OF MIDDLEBURG)
) SS.
STATE OF VIRGINIA)

Juanita Swedenburg, being first duly sworn, upon oath, states as follows:

1. I am a citizen of the United States, a resident of the State of Virginia, and over 18 years of age. I am a plaintiff in this action. I make this affidavit based on my personal knowledge of the facts set forth and am competent to testify thereto if called as a witness at trial.

2. Swedenburg Winery is a very small producer that sells small amounts of our specialty wine to customers, many of whom like buying our wine as a reminder of

their visit to our winery. We are nowhere near as large as a Gallo or a Kendall-Jackson.

3. I estimate that if we were allowed to direct ship in New York, we would sell approximately ten to fifteen cases a year to New York customers. That may not sound like a lot, but it is a significant part of Swedenburg Winery's sales. On the other hand, I know from experience that, for a wholesaler, ten to fifteen cases is an extremely small volume – not enough to bother with. In any case, as a small producer, we cannot afford the time and money it would take to find a wholesaler in New York. Trying to find a wholesaler in all fifty states would be even more prohibitive.

4. Even if we did find a wholesaler that would actually carry and, more importantly, sell our wine, the mark-up we would have to give to that wholesaler would wipe out our entire profit margin. It costs us more to produce our product as a small winery because we have such a small volume, so we cannot afford to have a wholesaler take its large cut the way a bigger winery can. It is only by selling directly to customers and having our customers cover all shipping costs, which our customers do, that we are able to stay in business. If we had to ship through wholesalers, our business would definitely go under. It's that simple. I don't think that makes us greedy for not using a wholesaler. We just want to stay in business.

5. For us, the wholesaler adds absolutely nothing to the transaction. Our customers contact us directly. There is no role of value a middleman can play, but it would add cost and inconvenience in the detriment of both the winery and the customer.

6. Most of our out-of-state sales are to people who have visited the winery. We don't always know where our visitors are from, so it is difficult to say how many

people visit from New York, but I would estimate that we see at least 50 visitors from New York annually.

7. There is no New York license available for out-of-state wineries. The intervenors have said all we need to do is to become a New York winery or wholesaler. The idea of Swedenburg Winery getting a New York winery or wholesaler's license to ship ten to fifteen cases a year as the intervenors have suggested is ludicrous. It would be a downright stupid business decision to spend $10,000 (I understand that is John Dyson's testimony of approximately how much it cost him to get a New York wholesaler's license) in order to sell such a small volume. It is economically infeasible for a winery of our small size to consider such a thing. That $10,000 alone would put us out of business, and there would be costs above and beyond that.

8. A New York wholesale licensee has to have an office in New York State, but we do not have any land up there. We would have to pay to rent a place and pay the utilities. And the New York law says we would also have to hire an employee to be there during business hours. I don't think we could do that for less than $50,000, even if we just had a little shabby room. And we'd need a temperature-controlled warehouse, which under the New York law would have to have a separate entrance, if not its own building. We simply could not afford the time or money all this would require.

9. Trying to open a licensed winery in New York would be even more expensive and burdensome. Again, we would have to have a New York presence, but we have no land in New York. We could never afford to buy land in New York and build up a new winery there. We have already spent a million dollars on our Virginia winery, and we don't have another million. Besides, we are a Virginia winery and we don't intend

to have satellite wineries everywhere else. We would lose our identity.

10. All we want to do is sell as much of our wine as we are able to our special customers in New York. These are mostly people who come to visit our winery and then call once they get back home, wanting a case or two of our wine. They like the wine and they like the novelty of ordering from a place they have visited. The appeal of Swedenburg Winery for these sorts of customers is that we are small, and we want to stay small.

11. We are very proud of the quality of our wine. We regularly enter international competitions and competitions throughout the United States where we are up against every winery in the country. And we like it that way. We consider the entire country our market, and it is especially rewarding for us when we win a medal after going up against the whole country or even the whole world. In total, our wines have won over two hundred medals. Of course, the most important judges of the quality of our wine are our customers who like our wine enough to buy it for themselves and their friends. We have never had a customer complaint about the quality of our wine and we have many repeat customers.

/s/ Juanita Swedenburg
Juanita Swedenburg

Subscribed and sworn before me this
26 day of Sept. 2001.

Notary Public, City of Middleburg,
State of Virginia.

/s/ _____
Notary Public
My Commission expires 9-30-05

City/County of Loudon
Commonwealth/State of VA
The foregoing instrument was acknowledged
before me this 26 day of Sept., 2001, by
Juanita Swedenburg
(name of person seeking acknowledgement)

/s/ _____
Notary Public
My commission expires: 9-30-05

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

Exhibit 28 to Declaration of Clint Bolick, executed on October 11, 2001, in support of Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, dated October 17, 2001 – Supplemental Affidavit of John Dyson, sworn to on September 21, 2001

SUPPLEMENTAL AFFIDAVIT OF JOHN DYSON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CITY OF NEW YORK)
) ss.:
STATE OF NEW YORK)

John Dyson, being duly sworn, declares as follows:

1. I am an expert witness in this litigation. I make this affidavit based on my personal knowledge of the fact set forth below.

2. In their opening brief, defendants have mischaracterized my previous testimony and have made factual assertions I know to be untrue. In particular, they have (1) cited Millbrook Winery's relationship with a New York wholesaler to illustrate the purported benefits of the three-tier distribution system for wine; (2) cited the fact that my California winery can ship to New York residents

through my New York winery as evidence that no barriers to entry exist for out-of-state firms; and (3) contended that few New York wineries ship directly to New York residents.

3. In my prior affidavit, I expressed my views on the requirement that out-of-state wineries must use wholesalers to distribute wine in New York. For small wineries, it often makes no sense. In my experience, such relationships are costly, inefficient, and add little or no value to the transaction between winery and consumer. For that reason, we have terminated relationships with wholesalers where possible and prefer to sell or ship directly to consumers.

4. It is true, as I previously attested, that Millbrook Winery recently signed an agreement with a wholesaler to distribute some of our wine in limited parts of New York. The wholesaler made unusual concessions. The reasons it did so were clear: Millbrook is a well-established brand in New York, and we turned over our active accounts to the wholesaler. We are waiting to see whether the wholesaler can increase sales. It is only with those unusual concessions that it made economic sense for us to engage a wholesaler, and it remains to be seen whether it will work.

5. The key point is that it is only because Millbrook has the option of shipping directly to New York consumers that we have been able to establish our brand and negotiate an attractive deal with a wholesaler. We have not been able to do so in other states where Millbrook is less-established; nor would I expect that small out-of-state wineries could reach a similar agreement with a New York wholesaler absent a well-established reputation or customer base.

6. Nearly all New York wineries engage in direct shipping. Most New York wineries are small and each accounts for a tiny percentage of the overall volume of New York wines. Because they are located in prime tourist regions, they have visitors from all over. Orders from visitors account for a significant portion of in-state sales. Before a clamp-down on interstate shipping, many New York wineries shipped to out-of-state customers as well, and business has suffered now that they cannot do so. Direct shipping is a major element in the financial picture for the large percentage of New York wineries that are small.

7. It is good fortune that before purchasing Williams and Selyem Winery in California, I already owned a winery in New York. That is the only way we can ship wines made to Millbrook's specifications at our California winery to New York consumers. Certainly, we could not have opened a New York winery in order to distribute our California wines. Defendants' suggestion that out-of-state wineries can easily make millions of dollars of investments to open a New York winery in order to sell a bottle of wine to a customer is preposterous. Likewise, having to open a New York wholesaling operation makes no economic sense to a small out-of-state winery. It was precisely this sort of economic barrier that the commerce clause was designed to prevent.

8. We remit taxes on wines shipped directly to consumers to all states that require them, including California, New York, New Hampshire, Louisiana, and Nevada.

/s/ John Dyson
John Dyson

Subscribed and sworn before me this
21 day of September 2001.

Notary Public,
State of New York

/s/ Maureen Webb
Notary Public

My commission expires 5/10/03

MAUREEN WEBB
Notary Public, State of New York
No. 01WE6024321
Qualified in Kings County
Commission Expires 5/10/03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 00 CV 778 (RMB)

[Caption Omitted In Printing]

SUPPLEMENTAL AFFIDAVIT OF HOWARD P. KITT

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

HOWARD P. KITT, being duly sworn, deposes and says:

I. INTRODUCTION

1. I am an economist and Senior Vice President employed by National Economic Research Associates, Inc. ("NERA"), based in White Plains, New York. On behalf of counsel for Defendants, I filed an affidavit in this case in 2001.[1] My curriculum vitae was previously submitted to the Court.

2. Counsel for Defendants have asked me to quantify for the Court, based on the materials I have already presented with my original affidavit, the amount of wine New York State (NYS) wineries ship directly to NYS consumers. As I explain below, based upon data reported in the *1998 Survey of New York Wineries* ("the survey"), on

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[1] Affidavit of Howard P. Kitt, sworn to on August 16, 2001.

which I relied for my original affidavit,[2] direct shipments to New York State consumers account for a very small percentage of NYS wineries' sales – well under 1% and probably close to 0.5% of total volume – and an even smaller percentage of wine consumption in the state.

II. FINDINGS

3. Various tables in the survey report results for wineries categorized by two alternative geographical classifications: (i) Bureau of Alcohol, Tobacco, and Firearms (BATF) viticulture regions ("BATF regions") or (ii) wine trails. In this affidavit, I focus on two of those tables, "Percent of Total Wine Sales and Dollars by Type of Sale by [BATF] Region, 1997" and "Percent of Wine Sales by Location, Wine Trail, & Year," which also reports data for 1997 (and for 1985 and 1995 as well).

4. As I noted in ¶28 of my original affidavit, the survey questionnaire asked wineries to divide their sales into four types: (i) direct to consumers at the winery; (ii) direct to restaurants and liquor stores; (iii) through a New York distributor; and (iv) Other, which includes both shipments to out-of-state customers and direct shipments to New York consumers.[3]

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[2] *1998 Survey of New York Wineries*, New York Agricultural Statistics Service ("the survey"), originally available at www.nass.usda.gov/ny/bulletin/Winery/winery.htm. See footnote 23 and the discussion of some of the survey results at ¶¶26-28 of my original affidavit.

[3] Survey questionnaire, Section 5, for *1998 Survey of New York Wineries*, New York Agricultural Statistics Service. The table summarizing responses to that question, "Percent of Total Wine Sales and Dollars by Type of Sale by Region, 1997," lists the first type of sale as

(Continued on following page)

5. The first of the two tables mentioned in ¶3, "Percent of Total Wine Sales and Dollars by Type of Sale by Region, 1997," summarizes responses to that question for wineries in five BATF regions (Long Island, Hudson River, Cayuga Lake, Finger Lakes, and Lake Erie) and for "none" (*i.e.*, wineries that aren't located in a BATF region). For wineries located in three of those regions (Hudson River, Cayuga Lake, Lake Erie) and wineries in "None" of them, the last type of sales, "Other," accounted for 1% or less of the volume of wine. That percentage overstates the percentage of those wineries' volume that they shipped directly to NYS consumers, because, as noted in ¶4 above, "Other" includes shipments to out-of-state customers as well (including both wholesalers and out-of-state consumers). For wineries in the Long Island BATF region, the percentage of sales in "Other" is only 4%, which, for the same reason, overstates the percentage of wine shipped directly to NYS consumers.

6. For each of those regions, therefore, sales of the first three types listed in the table (direct to consumer at the winery, direct to restaurants and liquor stores, and through a NY distributor) account for at least 96% of total volume (and an even higher percentage for all but one of those regions). It follows *a fortiori* that those first three types of sales – *i.e.*, in-state sales of all types *except* direct shipments to consumers – account for at least 96% of those wineries' total sales within NYS. Equivalently, direct

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"Direct to Consumer." It is clear from the survey questionnaire itself, however, that that type includes only direct sales to consumers *at the winery*. (See question 4 in Section 5 of the survey questionnaire.) I have verified that fact, as well as the other definitions used in that survey, with State Statistician Stephen Ropel, who I understand oversaw and was responsible for preparation of the survey.

shipments to consumers accounted for less than 4% of their total sales within the state.

7. For the only other BATF region listed, the first table ("Percent of Total Wine Sales and Dollars by Type of Sale by Region, 1997") by itself provides less useful information for placing an upper bound on the percentage of wine shipped directly to NYS consumers: It indicates only that the "Other" category accounted for 87% of volume. Recall, however, that "Other" includes both shipments to out-of-state customers and direct shipments to New York consumers, and that table alone provides no information regarding the breakdown of "Other" between those two types of sales.

8. However, the second table mentioned in ¶3 above, "Percent of Wine Sales by Location, Wine Trail, & Year," does shed light on that question. That table shows the percentage of wine sold in three locations (NYS, Other States, and Other Countries), for each of six wine trails and for "None" (*i.e.*, wineries that are not on any of the six wine trails). As I explained in footnote 29 of my original affidavit, there is considerable overlap between the Finger Lakes BATF region and the wineries that were not located on any of the listed wine trails. For the latter wineries, those grouped as "None" in "Percent of Wine Sales by Location, Wine Trail, & Year," the survey results show that only 11% of their wine was sold in NYS in 1997.

9. That percentage, 11%, includes *all* types of sales within the state, not just direct shipments to consumers. Recall, moreover, that for five of the six regions listed in "Percent of Total Wine Sales and Dollars by Type of Sale by Region, 1997," direct shipments to consumers accounted for less than 4% of total sales within the state. If

that same upper bound percentage, 4%, is applied to wineries that are not listed on any wine trail (which, as noted above, overlap considerably with those located in the Finger Lakes region), direct shipments accounted for less than 0.5% (4% of 11%) of those wineries' sales.[4]

10. Note finally that wineries that are not on any of the wine trails listed in the survey account for the vast majority of wine produced in the state – 96% of production in 1997, according to the survey.[5] Those wineries, therefore, would be weighted most heavily in any weighted average of all wineries in New York State. Accordingly, based upon these survey results, for the state as a whole, well under 1% of the total volume of wine produced by New York State wineries – and probably close to 0.5% – is shipped directly to NYS consumers. Moreover, since NYS consumption of wine in 1997 exceeded NYS production of wine, direct shipments by NYS wineries to NYS consumers accounted for an even smaller percentage of NYS wine consumption. Specifically, in 1997, production of wine in New York State was roughly 77% of consumption of wine in the state.[6] Accordingly, direct shipments by NYS wineries accounted for

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[4] I understand that wineries that are not on the listed wine trails are, by and large, commercial wineries. It is not surprising, therefore, that they ship such a small percentage of their wine directly to consumers.

[5] See the table entitled "Wine Production and Capacity, By Wine Trail," which shows that wineries that are not on any of the wine trails listed in the survey produced 30.426 million gallons of wine in 1997, or nearly 96% of total production by New York wineries of 31.733 million gallons.

[6] See ¶26 of my original affidavit.

well under 0.8% – and probably close to 0.4% – of NYS consumption of wine.

/s/ Howard P. Kitt
Howard P. Kitt

Subscribed and sworn to before
me this 2nd day of December, 2002

/s/ Rita Satenstein
Notary Public

My commission expires 8/15/2006

RITA SATENSTEIN
Notary Public, State of New York
No. 4938855
Qualified in Westchester County
Commission Expires 8/15/06

(8)

No. 03-1274

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs/appellees below, are Juanita Swedenburg, in her own capacity, Juanita Swedenburg, as proprietor of Swedenburg Winery, a Virginia partnership; David Lucas, in his own capacity, David Lucas, as proprietor of The Lucas Winery, a California sole proprietorship; Patrick G. Fitzgerald, Cortes DeRussy, and Robin Brooks.[1]

State respondents, who were defendants/appellants below, are Edward D. Kelly, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; Lawrence J. Gedda, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities; Joseph Zarriello, Commissioner of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities.

Private respondents, who were intervenor/defendants/appellants below, are Charmer Industries, Inc.; Premier Beverage Company LLC; Peerless Importers, Inc.; Local 2d Of The Allied Food and Commercial Works International Union; Eber Brothers Wine and Liquor Corp.; Metropolitan Package Store Association, Inc., a trade association of New York-licensed alcoholic beverage retailers.

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[1] None of the petitioners are corporations, and have no parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a)[2] is reported at 358 F.3d 223 (2d Cir. 2004). The opinion of the district court granting summary judgment to petitioners (Pet. App. 34a-71a) is reported at 232 F. Supp. 2d 135 (S.D.N.Y. 2002). The order of the district court entering judgment for the petitioners (Pet. App. 72a-73a) is not reported.

STATEMENT OF JURISDICTION

The judgment below was entered on February 12, 2003. (Pet. App. 1a). The jurisdiction of this Court is proper under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates the Commerce Clause, U.S. Const., art. I, §8, cl. 3 (Pet. App. 74a); the 21st Amendment (Pet. App. 74a); and the Privileges and Immunities Clause, U.S. Const., art. IV, §2 (Pet. App. 74a). Statutes involved include the Wilson Act, 27 U.S.C. §121 (Pet. App. 75a); the Webb-Kenyon Act, 27 U.S.C. §122 (J.A. 25); the 21st Amendment Enforcement Act, 27 U.S.C. §122a (Pet. App. 76a); N.Y. Alco. Bev. Cont. Law §102(1)(c), and (d) (J.A. 18); §§3(12-a), 76(2), 76(4), 76(5), 76-a(6)(d) (Pet. App.

[2] References to the Appendix to the Petition for Writ of Certiorari are noted as "Pet. App." References to the Joint Appendix filed in this Court are noted as "J.A." References to the Joint Appendix filed in the Court below are noted as "2d Cir. J.A."

86a-90a, 93a), 77(4)(b)(4), 77(4)(f), 77(5) (J.A. 15), 99-b(1)(k), 105(9), and 130(1) (Pet. App. 95a-100a); and N.Y. C.L.S. Penal §10.00(4) (Pet. App. 101a).

STATEMENT OF THE CASE

A. Facts.

1. Petitioners Juanita Swedenburg and David Lucas own family wineries in Virginia and California, respectively. Many of their customers are tourists from other states, who enjoy their wine and would like to obtain it when they return home (J.A. 37-39; 2d Cir. J.A. 91-92, 3558-59). Among their customers are petitioners Patrick Fitzgerald, Cortes DeRussy, and Robin Brooks, all of whom live in New York.[3]

Mrs. Swedenburg is typical of the small winemakers who dominate the industry today. She opened her winery in the Virginia countryside in 1988. She is involved in all aspects of the winery's operations, from planting to harvesting to production to sales. Her total production is below 2,000 cases per year. Her award-winning wines cost between $10-$15 per bottle. Over 90 percent of her sales are to people who visit the winery, about half of whom reside outside Virginia. (J.A. 37).

Because they live in New York, the consumer petitioners cannot obtain wine from Swedenburg Winery or Lucas Winery, as a result of laws challenged in this litigation. New York, like most if not all states, uses a "three-tier"

[3] New York is the nation's second-largest wine market (2d Cir. J.A. 205).

system for distribution of most alcohol: producer to distributor to retailer to consumer. N.Y. Alco. Bev. Cont. Law (hereinafter ABC Law) §102(1)(c) (Pet. App. 81a) provides that "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." Accordingly, even if New York consumers travel to Virginia or California to visit the wineries, they cannot lawfully ship wine back to themselves. Unless the wine is carried by a New York liquor distributor, they cannot obtain the wine at all.

2. Prior to 1970, New York permitted some direct interstate shipments of wine for personal use (2d Cir. J.A. 364). *See People v. Ryan*, 8 N.E.2d 313, 315 (N.Y. 1937). But those exceptions were extinguished (2d Cir. J.A. 366) and the law was tightened to ensure that even wine for personal use would have to flow through liquor distributors (2d Cir. J.A. 387).[4] That "law was enacted . . . to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages." *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970); *see also* (J.A. 46-48).

3. While state law requires all out-of-state wineries to sell their wines through the three-tier system or not at all, New York has made multiple exemptions to that rule available to in-state wineries. The exemptions were expressly passed to promote the New York wine industry (2d Cir. J.A. 293, 299-301; Pet. App. 54a-55a). For example, ABC Law §76-a(6)(d) (Pet. App. 94a) permits licensed

[4] Section 102(1)(c) provides an exception for wines obtained outside the United States.

farm wineries – i.e., wineries located in New York producing wine only from New York grapes – to ship their own or other "New York State labeled wines"[5] directly to New York consumers.[6] Section 105(9) allows licensed retailers to deliver alcoholic beverages in their own vehicles or vehicles hired from a trucking company registered with the liquor authority. Under §76(4), commercial wineries can obtain a retail sales license and sell any New York State labeled wine at retail for consumption off-premises. Wineries in New York can also conduct tastings of New York State labeled wines (§76(2)(a)), they can sell New York State labeled wines at dinner theaters (§76(4)) and at state fairs (§77(5), and they can utilize "wine by wire" services to make deliveries on behalf of "other wineries within the state" (§76(5)). Both wineries and retailers in New York also can deliver alcoholic beverages in their own vehicles or those hired from a trucking company registered with the liquor authority pursuant to §105(9).

Most of the approximately 190 New York wineries, all but one of which are small, rely heavily on direct shipping to New York consumers (J.A. 42-43). However, New York's ban on direct shipping limits interstate markets for New

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[5] "New York State labeled wine" means wine made from grapes "at least seventy-five percent the volume of which were grown in New York State." ABC Law §3(20-a).

[6] Contrary to the liquor distributor respondents' repeated assertions, farm wineries do not have to use their own trucks, but instead may "[d]eliver or transport any New York State labeled wine manufactured or produced by the licensee or any other winery or farm winery . . . in any vehicle owned, leased, or hired by the licensee." ABC Law §76-a(6)(d). Farm wineries typically use United Parcel Service or similar carriers to deliver their wines to consumers (J.A. 44).

York wineries. About a dozen states (*see* map at 14) allow direct interstate wine shipments only from states that themselves allow such shipments. As a result, New York's law forecloses certain markets to the detriment of small New York wineries.

4. No license exists for out-of-state wineries to ship directly to New York consumers (J.A. 159). *See House of York*, 322 F. Supp. at 533. According to respondents, out-of-state wineries could technically ship directly to New York consumers by establishing a bricks-and-mortar business operation in New York, essentially becoming part of the three-tier system. Assuming this were possible, an out-of-state winery would have to open a New York commercial winery and a warehouse, obtain a retailer license, and ship through its own trucks or trucks licensed by the State Liquor Authority (J.A. 159-60; 2d Cir. J.A. 347, 359-60). The warehouse must be fully staffed, separate from other premises, and devoted solely to wine distribution, with stiff sanctions for violations (J.A. 149-151; 2d Cir. J.A. 347, 350-60). Establishing such full-scale business operations in another state is prohibitive for a small winery like Swedenburg or Lucas (J.A. 201; 2d Cir. J.A. 3560); and no winery has ever qualified to do so (J.A. 159). Moreover, an out-of-state winery still would not be able to avail itself of any of the sales and shipping opportunities listed above that are limited to wineries selling "New York State labeled wines."

In 1995, the New York Legislature overwhelmingly passed a bill to allow limited direct interstate shipment of wine to consumers (2d Cir. J.A. 444, 450-52); but under heavy pressure from the liquor distributors among others (2d Cir. J.A. 460, 477, 481-485, 496-500, 506-515, 522-534), the bill was vetoed by the governor (2d Cir. J.A. 442-43).

5. The effects of bans on direct interstate wine shipments are magnified by recent economic trends. In recent decades the liquor distributor industry has contracted. In 1999, the top 25 distributors accounted for 63.5 percent of all U.S. alcohol sales, and their share is growing (2d Cir. J.A.185-86, 279-86).[7]

At the same time, the number of American wineries has increased substantially, growing to more than 3000 in all 50 states (source: Tax and Trade Bureau). The vast majority are small family farms. In 1998, while the nation's top 25 wineries produced 215 million cases, or 82.7 percent of all wine, the remainder was produced by over 2400 wineries, most of which produced 5,000 cases or fewer (J.A. 187; 2d Cir. J.A. 184). As a result, distributors can make available on store shelves only a fraction of the tens of thousands of wines produced each year (J.A. 38-39, 186-187; 2d Cir. J.A. 3578), and have even less capacity to fully stock older vintages. Many wines that are unavailable on store shelves are available from the wineries, but New York consumers cannot obtain them due to the direct shipping ban (J.A. 187-189; 2d Cir. J.A. 3547-50, 3554-55, 3578-82, 3595).

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[7] As of 2004, their share reportedly has increased to 67.9 percent of the U.S. market, with sales of $21.7 billion. *See* "Top U.S. Wholesalers Keep Expanding as Big Changes Loom," *Impact*, April 15, 2004 at 1.

Although there are many distributors in the New York market, the industry is dominated by four giants – not coincidentally, the intervenor respondents here – each of which is among the top 25 national liquor distributors with combined sales of $2.74 billion nationally and $1.63 billion in New York. By contrast, the remaining New York liquor distributors average less than $1 million in annual sales (2d Cir. J.A. 185-86).

Other states have solved that conundrum by allowing wineries to ship across (and within) state boundaries directly to consumers. The number of states allowing direct shipping has increased markedly. When this lawsuit was filed in 1999, only 19 states permitted it and 31 prohibited it; while today 26 states allow it and 24 states forbid it (*see* map at 14). Accountability in states allowing direct shipping is ensured in multiple ways. States often require shipping permits, payment of taxes, and measures to protect against underage access (J.A. 46-47, 194-196). The Tax and Trade Bureau (TTB) (formerly Bureau of Alcohol, Tobacco and Firearms (BATF)) can revoke a winery's license if it violates state laws governing alcohol (BATF, Industry Circular No. 96-3, *Direct Shipment Sales of Alcohol Beverages* (February 11, 1997) (hereinafter BATF Industry Circular);[8] (J.A. 196-197; 2d Cir. J.A. 3581-82). Moreover, through the 21st Amendment Enforcement Act, 27 U.S.C. §122a, Congress authorized state attorneys general to enforce their liquor laws in their home-state federal courts against out-of-state wineries.

6. Direct shipment of wines has become the economic life-blood of thousands of small wineries, like Swedenburg and Lucas (J.A. 37-38, 44, 187-188; 2d Cir. J.A. 3546-50). The Internet has created the technological capacity for consumers to obtain any wine from any winery (J.A. 45-49). But in states like New York where direct interstate shipments are forbidden, wineries like Mrs. Swedenburg's must turn away orders from consumers, severely limiting the wineries' prospects for survival and constricting

[8] Available at http://www.atf.treas.gov/pub/ind_circulars/ic_96-3.htm.

consumer choices (J.A. 38-39, 190-191; 2d Cir. J.A. 93-94, 3546, 3552, 3557, 3574).

A 2003 staff report by the Federal Trade Commission found on the basis of extensive hearings that "state bans on interstate direct shipping represent the single-largest regulatory barrier to expanded e-commerce in wine." Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* at 3, 14 (2003), at http://www.ftc.gov/os/2003/07/winereport2.pdf (hereinafter FTC Report). The report found that such bans reduce consumer choice and increase prices. *Id.* at 3, 16-25. It reported that the states that allow direct interstate shipments of wine have satisfied their legitimate regulatory objectives by constructing mechanisms to safeguard against underage access and, where desired, to collect tax revenues. *Id.* at 4, 26-39.

B. Procedural History.

1. Plaintiffs filed this lawsuit in 1999, challenging ABC Law §§102(1)(c) and (d) (Pet. App. 81a-82a), as applied to prohibit direct interstate wine shipments, as a violation of the Commerce Clause and the Privileges and Immunities Clause (U.S. Const. art. IV, §2).[9] After considering an extensive record and the parties' cross-motions for summary judgment, the district court found the ban unconstitutional under the Commerce Clause. Applying *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), the court engaged in a two-part inquiry. First, the court concluded that under the Commerce Clause, the state's differential

[9] Plaintiffs also challenged the state's advertising ban under §102(1)(a) as a violation of the First Amendment. Both the district court and court of appeals invalidated that provision.

direct shipment rules, under which "out-of-state wineries must consign their products to a (three-tier) wholesaler, [while] in-state wineries do not" (Pet. App. 53a), triggered Commerce Clause scrutiny. "That the New York direct shipping ban on out-of-state wine burdens interstate commerce and is discriminatory (on its face) is clear from the wording (let alone the impact) of the exemptions favoring in-state wineries" (Pet. App. 53a). Not only does the system "provide an impermissible economic benefit and (protection) to only in-state interests," there exist "nondiscriminatory alternatives available to serve the state's interests" (Pet. App. 54a). The court found the effort and expense for an out-of-state winery to obtain a New York commercial winery license and establish business operations in the state to be "unreasonable" (Pet. App. 55a). As a result, the court concluded that the "ban on the direct shipment of out-of-state wine is *not* 'evenhanded' and constitutes a per se Commerce Clause violation" (Pet. App. 57a) (emphasis in original).

The court then turned to the State's 21st Amendment defenses, and found that "[t]he State has not established that its legitimate goals" of temperance and tax revenues "cannot be accomplished in a nondiscriminatory manner" (Pet. App. 64a). The court enjoined defendants from prohibiting out-of-state wineries from shipping wine to consumers on the same terms and conditions as New York wineries (Pet. App. 72a-73a).

2. The Second Circuit reversed. Though the court acknowledged that the district court had "rel[ied] on the method of analysis utilized by a number of the other federal courts in similar challenges" (Pet. App. 9a), it proceeded to use an analysis "that only one other circuit court has employed" (Pet. App. 13a). Specifically, the court

rejected a "two-tier" analysis in which the statute is assessed both under the Commerce Clause and 21st Amendment (Pet. App. 12a), instead considering "the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause" (Pet. App. 13a). The court found that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state" (Pet. App. 25a). Although "fully recogniz[ing] that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol" (Pet. App. 26a), here the State's aim was to "ensure accountability" over alcohol distribution (Pet. App. 27a), and therefore was within the State's 21st Amendment powers.

3. This Court granted the petition for writ of *certiorari* limited to the question presented, and consolidated the case with a Michigan case raising the same question in Nos. 03-1116 and 03-1120.

SUMMARY OF THE ARGUMENT

It is common today to lament the vanishing of the family farm from American life. The tradition of the yeoman farmer, true to the soil, is a deeply imbedded image that exemplified basic American values from the founding era through the Depression.

Today, that tradition is kept alive in vineyards across America by stalwart family farmers like Juanita Swedenburg

and David Lucas. It is to the protection of such small entrepreneurs against discriminatory trade barriers that the promise of the Commerce Clause was addressed. As Justice Jackson majestically declared in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949),

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The Commerce Clause thus operates to prohibit a state from discriminating against the farmers and craftsmen of its sister states in favor of its own industries. This guarantee is well-established in 150 years of case law, *see West Lynn Creamery v. Healy*, 512 U.S. 186, 194 (1994), a doctrine that operates to protect both producers and consumers.

As the record abundantly demonstrates, the ban on direct interstate wine shipments here was not adopted for benign purposes. Regardless, the method itself is impermissible. Choosing two sets of rules for alcohol distribution – one for in-state producers and another far more onerous set for out-of-state producers – not only violates the cardinal Commerce Clause requirement of nondiscrimination, but also betrays the State's protectionist predilections.

Such a discriminatory scheme is permissible only if the 21st Amendment nullifies the Commerce Clause, so that the State need only invoke the 21st Amendment to shield a distribution regime even if it serves protectionist

ends through blatantly discriminatory means. The Second Circuit did as much when it created an unprecedented 21st Amendment "exempt[ion]" (Pet. App. 13a) to the Commerce Clause, in stark contradiction to this Court's holding in *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), and decades of other precedents. Those decisions command that both constitutional guarantees must be respected: specifically, that while the 21st Amendment provides states broad authority over the distribution of alcohol within their borders, it does not invest states with power to enact discriminatory legislation dressed in a facade of temperance. The protectionism manifest in this case cannot stand.

ARGUMENT

I. NEW YORK'S DISCRIMINATORY WINE SHIPMENT BAN CONSTITUTES A VIOLATION OF THE COMMERCE CLAUSE.

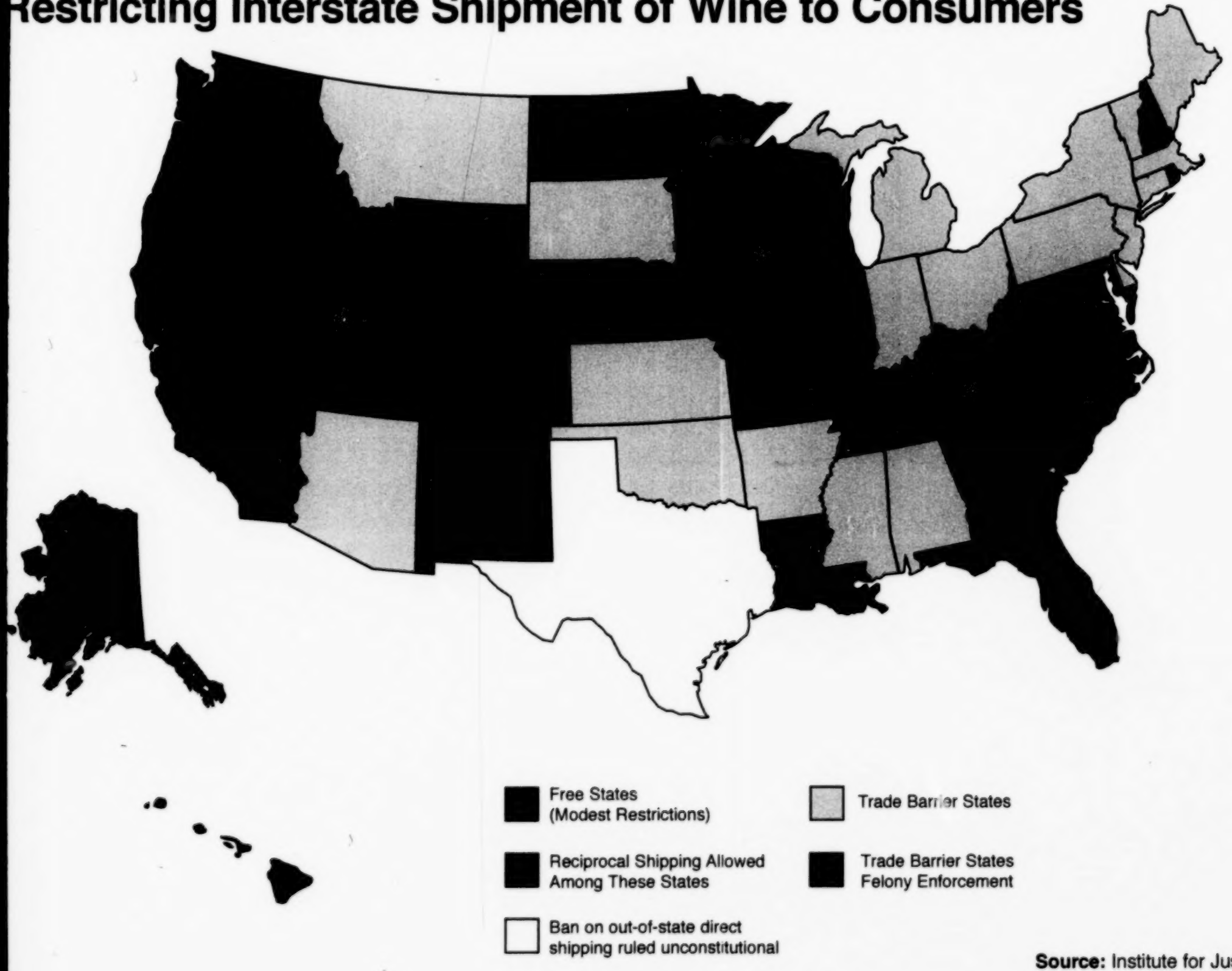
By expressly declining to engage in a "two-tier" constitutional analysis (Pet. App. 12a), the part of the Constitution that the court below jettisoned was the Commerce Clause and its requirement of nondiscrimination in state regulation of commercial intercourse. The court had to perform that surgery in order to reach the conclusion that the New York direct interstate shipment ban was constitutional, for the court itself acknowledged that the ban "create[s] substantial dormant Commerce Clause problems" (Pet. App. 26a). In that latter conclusion, the court undoubtedly was correct.

"The few simple words of the Commerce Clause," this Court declared in *Hughes v. Oklahoma*, 441 U.S. 322, 325

(1979), "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." The hodgepodge of conflicting state regulations over direct interstate shipping of wine depicted on the map on the following page paints in striking terms precisely the portrait of economic Balkanization the Framers sought to avoid. In some states, Mrs. Swedenburg can freely sell her wine directly to consumers; in others, to do so would constitute a felony. More to the point: in New York, a domestic winery can freely sell and ship wine to consumers; but if Mrs. Swedenburg tries to do so, she would be subject to criminal penalty[10] and loss of her livelihood, solely by virtue of her residency. That is the type of disability the Commerce Clause forbids.

[10] In New York, violation of direct shipping laws is a criminal misdemeanor (ABC Law §130; J.A. 151).

Restricting Interstate Shipment of Wine to Consumers



Source: Institute for Justice

Nor is the plight of Juanita Swedenburg and her desirous patrons at all unique. The Federal Trade Commission has characterized state bans on direct shipment of wine to consumers as "the single largest regulatory barrier to expanded e-commerce in wine," leading to diminished consumer selection and increased prices. FTC Report at 3, 14-25. Just this year, the FTC found that allowing direct interstate shipping would "allow New York residents to purchase a greater variety of wines at lower prices," and "would enhance consumer welfare and enable New York to meet its other public policy goals."[11] Plainly, the Commerce Clause is implicated by both the interests of producers and consumers; and as we shall show in Part II, the 21st Amendment presents no bar to their vindication.[12]

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[11] Letter from Todd Zywicki, Director, Office of Policy Planning, Federal Trade Commission, et al., to William Magee, Chairman, New York Assembly Agriculture Committee, et al. of 3/29/04, at 2, at http://www.ftc.gov/be/V040012.pdf (hereinafter FTC Letter).

[12] We are mindful and respectful of the fact that some Justices have called into question the legitimacy of "negative Commerce Clause" analysis. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609-39 (1997) (Thomas, J., dissenting); *Tyler Pipe Indus. v. Wash. State Dep't of Rev.*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part). Despite those misgivings, we urge the Justices to reach a result here in keeping with the well-developed jurisprudence under that doctrine.

We do not take the thoughtful concerns of those Justices to indicate disagreement with the underlying constitutional values, but rather with the derivation of those values from the Commerce Clause. In this case, the same result petitioners urge under the Commerce Clause should also obtain under the Privileges and Immunities Clause, U.S. Const. art. IV, §2, which protects the right of out-of-state residents to conduct business on the same terms as in-state residents. *See, e.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003); *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 219 (1984); *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985); *Toomer v.*

(Continued on following page)

A. Discriminatory Direct Shipment Bans Violate the Commerce Clause.

The overriding concern of the Commerce Clause is discrimination. "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce – from wholesaler to retailer to consumer – is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." *West Lynn Creamery*, 512 U.S. at 702.[13] Failure by a state to adhere to the "cardinal requirement of nondiscrimination" is almost always fatal. *New Energy*

Witsell, 334 U.S. 385, 396 (1948); *Dickerson v. Bailey*, 336 F.3d 388, 403 n.67 (5th Cir. 2003).

As even the Second Circuit concedes ("Section 2's grant of authority to the state to regulate alcohol within its borders could not sustain state statutes that violated individual liberties protected by other constitutional provisions" (Pet. App. 19a)), the 21st Amendment impacts the scope of the Commerce Clause, but not any other provision of the Constitution. *See, e.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996); *Craig v. Boren*, 429 U.S. 190, 206 (1976). Petitioners raised a Privileges and Immunities claim below, on which this Court did not grant review. Still, it makes sense from the standpoint of both judicial economy and justice to take into account the background principles of the Privileges and Immunities Clause when interpreting the Commerce Clause in this case. (For a fuller explication of this argument, *see* Brief of Amicus Curiae Virginia Wineries Association filed in Case No. 03-1274).

The discriminatory wine ban implicates other constitutional doctrines as well, including equal protection, *see, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Yick Wo v. Hopkins*, 118 U.S. 356 (1897); and the right to travel, *see, e.g., Saenz v. Roe*, 526 U.S. 489 (1999). A decision upholding a discriminatory ban under the Commerce Clause would be in patent disharmony with the values protected by those constitutional guarantees.

[13] "The Court, without dissent, has vigorously enforced the nondiscrimination principle to this day." Anderson, "Direct Shipment of Wine, the Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform," 37 *Akron L. Rev.* 1, 19 (2004).

Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988). Discrimination, then, is both the beginning and end of the Commerce Clause inquiry, for it ferrets out the protectionism that the clause was meant to proscribe.

In *Hughes*, 441 U.S. at 336, the Court set forth the "general rule" of Commerce Clause inquiry:

> [W]e must inquire (1) whether the statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

The initial burden to show discrimination rests with the challenging party, but once that burden is met, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977). "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory purposes." *Hughes*, 441 U.S. at 337. "Furthermore, when considering the purpose of a challenged statute, this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." *Id.* at 336 (citations omitted).

There are many forms of facial discrimination, all of which trigger strict scrutiny. The classic form of facial discrimination, of course, is where a state flat-out imposes

two different sets of fees or requirements, with the more onerous burden placed upon interstate commerce. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977). Variations on the theme include instances where the state creates a set of fees or regulations, then creates an exemption for in-state industries or products, *see, e.g.*, *Bacchus*, 468 U.S. 273; *Hale v. Bimco Trading*, 306 U.S. 375 (1939); where the state creates special burdens for interstate commerce as a condition of doing business in the state, *see*, *e.g.*, *Union Co. v. Kansas*, 216 U.S. 1 (1910); and where the state requires the establishment of in-state business operations to enjoy special benefits available to residents. *See, e.g.*, *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921); *see also* Part IC, *infra*. New York's ban on direct interstate wine shipments is distinguished in that it manages to encompass *all* of the foregoing varieties of facial discrimination against interstate commerce.

In sum, the demands placed upon the State to justify a facially discriminatory statute constitutes "an extremely difficult burden, 'so heavy that "facial discrimination may by itself be a fatal defect."'" *Camps Newfound/ Owatonna*, 520 U.S. at 582 (citations omitted). The clumsy and severe discrimination practiced by New York should be condemned.

B. The State's Ban on Interstate Direct Shipping, and the Exemptions for Domestic Wineries, Are Protectionist in Structure, Origin, and Avowed Intent.

The Court need not journey far to discover overtly protectionist motives in this case: as in *Bacchus*, the State has confessed its protectionist motivations.

The State adopted its three-tier system for alcohol distribution following the end of Prohibition. Since then, there have been three flashpoints at which the State avoided the high road in favor of the protectionist route: (1) when it tightened restrictions on interstate direct shipments in 1970; (2) when it created exemptions to those restrictions for in-state producers; and (3) when the governor vetoed legislation in 1995 that would have permitted interstate direct shipping. All three instances are uncontroverted and well-documented in the record.

In 1970, changes were made to the ABC laws to close direct shipment loopholes (2d Cir. J.A. 387). The legislative history makes clear, as summarized by a telegram to the governor from the "Council [of] Greater NY Wholesale Liquor," that "our ndustry (sic) an (sic) the state are hurt by the conditions this bill corrects," and that the bill "is supported by the entire alcoholi (sic) beverage industry" (2d Cir. J.A. 372); and indeed, support poured in from affected in-state business interests (2d Cir. J.A. 415-29). In a case challenging the law that same year, the district court found that it "was enacted . . . to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages." *House of York*, 322 F. Supp. at 533.

In 1995, the legislature passed by an overwhelming margin a bill authorizing direct shipment of wine from states providing reciprocal opportunities for New York wineries. The bill contained quantity limits and safeguards against underage access (2d Cir. J.A. 449-53). Many New York State wineries supported the bill because it would open markets to their products in other states (2d Cir. J.A. 447, 458-59, 489-93, 502-03, 516-19). Liquor distributors and their allies turned out in force against the

bill (2d Cir. J.A. 477, 481-88, 497, 499-500, 505, 507, 509-10, 522-36). The bill was vetoed by Gov. George Pataki, whose veto message was avowedly protectionist. He assailed its "potentially negative impact . . . on existing, licensed New York businesses relying on wine sales," arguing that it could "lead to a decrease in sales for New York liquor stores and distributors" (2d Cir. J.A. 442).

Likewise, the direct shipment exemptions on their face are intended to promote New York wineries (Pet. App. 54a-55a; 2d Cir. J.A. 296-305), an intent conceded by the state's attorney in the district court (Pet. App. 55a). "Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid [local] industry." *Bacchus*, 468 U.S. at 271. The discriminatory ban against direct interstate wine shipments is a system by, of, and for New York economic interests. As such, it constitutes a classic violation of the Commerce Clause.

C. The In-State Premises Requirement Does Not Decontaminate the Discrimination.

One point on which the parties agree is that there is no way an out-of-state winery, as such, can ship directly to New York consumers. As the State Liquor Authority's general counsel flatly admitted, "the plaintiffs seek to engage in a business – the direct shipment of wine from out-of-state wineries to New York consumers – which is not allowed under the ABC law" (J.A. 159). Given the fact that in-state wineries freely may do so, that presents a clear-cut case of discrimination.

The Second Circuit's way around that serious obstacle was to respond: then just become a *New York winery*. It

concluded that there is no real discrimination because out-of-state wineries can access direct shipment opportunities merely by establishing a "physical presence" in the state. So stated, the burden sounds so light, so ephemeral, as to be downright evanescent. Why didn't the plaintiff wineries think of doing that? All of this litigation could have been avoided.

As depicted in the appeals court decision, one might imagine that the legislature sat down in dispassionate, statesmanlike fashion and produced a thoughtful system to create a careful, structured "physical presence" requirement. In fact, of course, it did no such thing. What the legislature did was to tighten the screws on interstate direct shipping on the one hand while creating exemptions for in-state wineries on the other. It took the general counsel of the State Liquor Authority, in response to this lawsuit,[14] to cobble together different parts of the law to construct a theoretically possible route for out-of-state wineries to access direct shipping opportunities. That putative solution is so complex, convoluted, and burdensome that not a single winery has ever even attempted it.[15]

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[14] Previously, the State flatly informed out-of-state wineries that they could not ship directly to New York consumers (2d Cir. J.A. 306-346).

[15] The requirements, as described by respondents' witness (J.A. 159-160), include opening a branch office and warehouse, applying for a winery license and warehouse permit, then applying for a retailer permit that allows sale to "a householder for consumption in his home," and shipping through a common carrier licensed to deliver alcoholic beverages. The warehouse must be fully staffed, separate from other premises, and devoted solely to wine distribution, with stiff sanctions for violations (J.A. 150-151; 2d Cir. J.A. 347, 350-60). Moreover, an out-of-state winery would have to buy or lease an office and establish operations in New York *before* even knowing whether its New York

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(J.A. 159). Yet that is the peg on which the Second Circuit hung its hat.[16]

It doesn't work, on multiple levels. An in-state business premises requirement would be the exception that swallows the rule of nondiscrimination. If a state may deflect a Commerce Clause claim by saying that an out-of-state producer can transact with in-state consumers so long as it does so as an in-state business, that would eviscerate the Commerce Clause, for it is almost always at least technically possible to do exactly that. The point of the Commerce Clause (and, for that matter, the Privileges and Immunities Clause) is to protect the flow of commerce *across* state lines. And as a practical matter, obviously, the large majority of American wineries that are small cannot maintain fully staffed, bricks-and-mortar business operations in multiple states, let alone all 50 – which would be permitted, of course, by the rule proposed below.

That concept is antithetical to the national market that animated the Framers. Imagine Thomas Jefferson's reaction if he had been told after the Constitution was adopted that in order to sell goods in New York, he would have to move there. Juanita Swedenburg, likewise a proud

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license was approved. *See* ABC Laws §§105(1), 110(1)(b) & (f) (J.A. 159). Even assuming an out-of-state winery could overcome these incredibly costly hurdles, as amicus Millbrook Winery points out, the sales and shipping options are still heavily skewed in favor of wineries that are physically located in New York and those that produce wine from New York grapes. *See* Brief of Amicus Curiae Millbrook Vineyard and Winery filed in Case No. 03-1274.

[16] This concept appears to have originated in an earlier Second Circuit ruling dealing not with wine but with tobacco products. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

Virginian, feels the same way. That is why it is a centerpiece of Commerce Clause jurisprudence that a state cannot encourage an out-of-state firm "to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *accord*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996). As a result, "the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal."[17] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

States have attempted such end-runs around the Commerce Clause for well over a century, and this Court has rejected them equally as long. In *Ward v. Maryland*, 79 U.S. 418 (1870), the state argued that out-of-state businesses could avail themselves of certain in-state preferences by bringing their goods into the state to sell, which the Court rejected. As Justice Bradley observed, "[S]uch a law would effectually prevent the manufacturers of the manufacturing States from selling their goods in other States unless they established commercial houses therein, or sold to resident merchants who chose to send them orders." *Id.* at 432 (Bradley, J., concurring). Such is precisely the vice here. *See, e.g.*, Brownlee, "Economic

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[17] As a result, "most courts would find that a 'regular place of business' requirement is per se unconstitutional." *Codar, Inc. v. Ariz.*, No. 94-1690Z, 1996 U.S. App. LEXIS 21536, at *10 (9th Cir. August 19, 1996); *accord*, *Nutritional Support Svcs., L.P. v. Miller*, 830 F. Supp. 625 (N.D. Ga. 1993); *Ga. Ass'n of Realtors, Inc. v. Ala. Real Est. Co.*, 748 F. Supp. 1487 (M.D. Ala. 1990); *Underhill Assocs., Inc. v. Coleman*, 504 F. Supp. 1147 (E.D. Va. 1981).

Protection for Retail Liquor Dealers: Residency Requirements and the Twenty-first Amendment," 1990 *Colum. Bus. L. Rev.* 317 (1990).

Similarly, in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court struck down a law requiring that milk sold in Madison, Wisconsin must be processed at a plant nearby. Finding that such a requirement "plainly discriminates" against interstate commerce, *id.* at 354, the Court concluded that the law was unconstitutional because "reasonable and adequate alternatives" were available to protect health and safety concerns. *Id.* Similarly, in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994), the Court invalidated a flow control ordinance, finding that "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it," so that restricting such service to specific entities "thus deprives out-of-state businesses of access to a local market." *Id.* at 389. So too does the challenged law restrict access to a local market by creating a local distribution monopoly; but the law here is even more brazen because it exempts local producers from the same requirements.

D. The New York System Is Blatantly Discriminatory.

Even if the theoretical option of an in-state, bricks-and-mortar business establishment requirement were to qualify for the talismanic status under the 21st Amendment afforded to it by the Second Circuit, it would be unavailing in this case, for it still leaves the playing field sharply skewed. "Under this scheme," the appeals court acknowledged with remarkable understatement, "out-of-state wineries will incur some costs in establishing and

maintaining a physical presence in New York, costs not incurred by in-state wineries" (Pet. App. 26a).

In essence, the court of appeals perceives the extra costs as a type of permissible differential tax. But the Commerce Clause does not say that discriminatory burdens are okay so long as some theoretical means exist for an outsider firm to gain access to the market. Rather, it is held to require a fully level playing field. For that reason, differential tax burdens repeatedly have been struck down. *See, e.g., James B. Beam Distilling Co. v. Ga.*, 501 U.S. 529 (1991); *Bacchus*, 468 U.S. at 272; *Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exch.*, 429 U.S. at 332; *Halliburton*, 373 U.S. at 65-75.

Even if those costs were moderate, which they are not,[18] it would make no difference; for discriminating, like sinning, is a vice whose consequences are the same even if you only do it a little bit. "The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). It precludes *any* "differential burden on any part of the stream of commerce." *West Lynn Creamery*, 512 U.S. at 202. Where a law is facially discriminatory, any impact on interstate commerce, no matter how small, is sufficient to invoke strict scrutiny. "The volume of commerce affected . . . is of no relevance to the determination of whether a State has discriminated against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992). "[A]ctual discrimination, wherever it is found, is

[18] For the overwhelming majority of out-of-state wineries that do not also happen to own New York wineries, the cost of establishing a fully staffed winery and warehouse in New York (and elsewhere if such a restriction is valid) is prohibitive, to put it mildly (*see, e.g.*, J.A. 201-202; 2d Cir. J.A. 3560-61).

impermissible, and the magnitude and scope of discrimination have no bearing on the determinative question whether discrimination has occurred." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994). Hence, "where discrimination is patent . . . , neither a widespread disadvantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Ind. v. Limbach*, 486 U.S. at 276. *Accord*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 n.3 (1996) (no *de minimis defense to facial discrimination*); *Bacchus*, 468 U.S. at 269 ("the small volume of sales of exempted liquor" is irrelevant); *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981) ("we need not know how unequal the Tax is before concluding that it unconstitutionally discriminates").

But here, the discrimination is not a smidgeon, it is whopping. The appeals court trivialized the additional costs of separate bricks-and-mortar business establishments in two states (which could of course be more if other states join the parade)[19], and they are noxious enough. But it overlooked totally the fact that even if an out-of-state winery managed to open a New York winery in order to avail itself of direct shipping opportunities, it *still would be foreclosed from the easiest direct sales and shipping options, which are available only to wines made from New York grapes.*

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[19] "[T]he practical effect of the statute must be evaluated . . . also by considering . . . what effect would arise if not one, but many or every State adopted similar legislation." *Healy*, 491 U.S. at 336; *Carbone*, 511 U.S. at 406 (O'Connor, J., concurring in the judgment).

As the chart on the next page illustrates, New York provides three options for direct shipping. It reserves the easiest for farm wineries – a status that most New York wineries hold (J.A. 206) – while applying far more cumbersome requirements to others. The discrimination could not be more palpable: ABC Laws §76-a5 (Pet. App. 93a) provides, "No licensed farm winery shall manufacture or sell any wine not produced exclusively from grapes or other fruits or agricultural products grown or produced in New York state."[20] Similarly, many of the direct sales and shipping options for commercial wineries in New York are limited to the sale of "New York State labeled wine." *See* ABC Laws §§76(2)(a) (tastings); 76(4) and 77(4)(b)(4) (allowing sales and deliveries of New York state labeled wines from other wineries and at dinner theaters); 76(5) (allowing sales at state and county fairs and farmers markets); 77(5) (allowing sales on Sundays and at the state fair). So that even if the State does have a legitimate purpose in forcing out-of-state wines to establish business operations in New York, out-of-state wineries still would be subject to blatant facial discrimination.

[20] Nor could the intended favoritism be more clear. In empowering the State Liquor Authority to issue implementing regulations, §§76a(4)(d) (Pet. App. 93a) and 77(4)(f) (J.A. 14-15) commands the authority to "promote the expansion and profitability of wine production and tourism in New York."

DIRECT SHIPPING O	
OPTION	**NEW YORK WINE**
Farm wineries exemption (ABC Law § 76-(6)(b))	Wineries located on New York ship wine produced exclusively York grapes directly to consum their own trucks or trucks hired others.
Wine by wire (ABC Law § 76(5))	Wineries located "within the st have their wine delivered by ot located "within the state."
Commercial wineries exemption (ABC Law §§ 76(4) and 105-9)	Commercial wineries may obta sales license to sell at retail and "New York state labeled wines must be in their own trucks or i hired from a company registere State Liquor Authority.

TIONS	
RIES	**OUT-OF-STATE WINERIES**
arms may from New rs using from	Unavailable.
te" may er wineries	Unavailable.
n a retail deliver ' Delivery trucks with the	Out-of-state wineries must obtain a winery license and establish a branch office and warehouse in New York. ABC Law §§ 3(37), 96. Wine must then be shipped from out-of-state winery and consigned to in-state warehouse. *Id.* §§ 3(37), 102(1)(c) and (d). (J.A. 159-60.) Winery must then obtain a certificate, issued in the liquor authority's "discretion and upon such terms and conditions as it may prescribe," authorizing the retail sale of wine to a "householder for consumption in his home." ABC Law § 77(2). The winery may then deliver to such individuals using a trucking company licensed by the State to transport alcoholic beverages. *Id.* § 105(9). The warehouse must be fully staffed, in premises separate from other businesses and dedicated solely to wine distribution. ABC Law § 3(37). (J.A. 159-60; 2d. Cir. J.A. 347, 35-60.)

In other words, the New York law frees in-state wineries from the three-tier system altogether, while out-of-state wineries are forced to become *part of the three-tier system*. New York wineries may sell and ship wine directly to consumers *as wineries*; out-of-state wineries only may do so if they assume all three roles in the distribution process: winery, wholesaler, and retailer.

Just as a "preferred right of access" to a state's resources is discriminatory, *see, e.g. City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978), so too is a preferred right of access to its consumers. As this Court set down the rule in *Oregon Waste*, 511 U.S. at 99, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid."

Here, New York regulates direct wine shipments not by one set of rules but by two: one set, which imposes hardly any impediments at all, that are applicable only to domestic wine products; while a second, far more cumbersome regime applies to all others. *Compare Kassel v. Consolidated Freightways, Inc.*, 450 U.S. 662 (1981) (differential rules struck down). As the Fifth Circuit so aptly put it in striking down Texas' discriminatory direct shipment rules, "To paraphrase the Bard, that which we call discrimination by any other name would still smell as foul." *Dickerson*, 336 F.3d at 398 (finding that the "numerous ways in which in-state wineries are exempt" demonstrates that the system "is neither evenhanded nor incidental"); *see also* Pet. App. 52a-57a (district court findings of discrimination and protectionism). The discrimination is here blatant, overtly protectionist, and invalid under the Commerce Clause.

II. THE 21st AMENDMENT PROVIDES NO SHELTER FOR LAWS THAT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

A. The Commerce Clause and 21st Amendment Must Be Construed in Tandem.

1. The court of appeals rested its decision upon a claim as sweeping as it is unsupportable: that if the exercise of state power is "within the ambit" of 21st Amendment authority, "it is exempted from the effect of the dormant Commerce Clause" (Pet. App. 13a). Whatever superficial appeal that assertion might hold disappears quickly upon examination of the amendment's history and of this Court's efforts to harmonize rather than cannibalize constitutional provisions.

Section 2 of the 21st Amendment did restore states' powers to regulate the "transportation or importation" of intoxicating liquors within their borders. "[T]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The use of a three-tier system to implement such a system is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990). Indeed, a state may lawfully "require that *all* liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Id.* at 447 (Scalia, J., concurring in the judgment) (emphasis added).

However, this is merely the beginning of the 21st Amendment, not its end. For in exercising their authority over "how to structure the liquor distribution system," *Midcal*, 445 U.S. at 110, the Constitution, acts of Congress,

and this Court's precedents all make it clear that a state must choose one set of governing rules, not two. Or, to borrow Justice Scalia's phrase, it may require *all* of its liquor to pass through a three-tier system, but not merely that which is sold by out-of-state producers. There is no question that the states' 21st Amendment powers are broad. But the decision below rests upon the premise that those powers are plenary, creating a sort of Commerce Clause-free zone, which they do not.

Before Prohibition, this Court construed the Commerce Clause to forbid state interference with interstate shipment of alcohol *at all*. *See, e.g.*, *Leisy v. Hardin*, 135 U.S. 100 (1989). In the Wilson Act, 27 U.S.C. §121, Congress allowed states to regulate sales of imported alcohol to the same extent they chose to regulate domestically produced alcohol. Then, to eliminate the loophole in the Wilson Act that allowed producers to consummate the "sale" of alcohol outside a state and then transport it into the state, Congress enacted the Webb-Kenyon Act, 27 U.S.C. §122, which made it clear that states could exclude alcohol altogether. Those affirmative actions by Congress narrowed the scope of the Commerce Clause but did not eliminate it. *See, e.g.*, *Scott v. Donald*, 165 U.S. 58, 100 (1897) ("the State cannot, under the [Wilson Act] . . . , establish a system which, in effect, discriminates between interstate and domestic commerce").

In repealing Prohibition, Congress constitutionalized the provisions of the Wilson and Webb-Kenyon Acts in section 2 of the 21st Amendment. *See Craig v. Boren*, 429 U.S. 190, 205 (1976); *Fla. Dep't of Bus. Reg. v. Zachy's Wine and Liquor*, 125 F.3d 1399, 1401 (11th Cir. 1997). In so doing, Congress re-extended to the states broad authority to regulate alcohol, but it did not expunge the

nondiscrimination principle. To the contrary, Congress expressly reaffirmed it by re-enacting the Wilson Act, 27 U.S.C. §121, subsequent to the passage of the 21st Amendment. The law's nondiscrimination command could not be more explicit in providing that all alcoholic products "transported into any State . . . shall . . . be subject to the operation and effect of the laws of such State . . . *to the same extent and in the same manner as though such liquids or liquors had been produced in such State.*" (Emphasis added).[21]

2. By ignoring not only the context and intent of section 2 of the 21st amendment but also the Commerce Clause itself, the court below overlooked the fact that there would have been no Constitution to which to attach a 21st Amendment were it not for the presence of the Commerce Clause. Only a generation removed from its ratification, the Court in *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824), remarked that, "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

Far from fading into a quaint historical relic, the Commerce Clause is more salient today than ever. The advent of the Internet and its vast, unprecedented promise of consumer freedom are juxtaposed against the predictable efforts of middlemen who resort not to the marketplace but to the coercive power of the state to protect their economic hegemony, to the detriment of producers and

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[21] Indeed, the State respondents, in their opening Second Circuit brief below (at 6), correctly observed that the Wilson Act "removed the privileged status enjoyed by interstate sellers, *without authorizing states to discriminate against them*" (emphasis added).

consumers alike. *See, e.g.*, Newkirk and Atkinson, "Buying Wine Online, Rethinking the 21st Amendment for the 21st Century," *Progressive Policy Inst.*, January 2003 (available at http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=140&subsecID=900055&contentID=251266); Smith, "Consumer Protection or Veiled Protectionism? An Overview of Recent Challenges to State Restrictions on E-Commerce," 15 *Loy. Consumer L. Rev.* 359 (2003). All too often, states are willing to shelter their own firms from competition. It is to preserving an unfettered national marketplace that the Commerce Clause is devoted.

The 21st Amendment restored state control over alcohol, but did not obliterate the core Commerce Clause concern against discrimination. As this Court aptly put it in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), the notion that the 21st Amendment "has somehow operated to 'repeal' the Commerce Clause . . . [is] an absurd oversimplification."[22] By limiting its constitutional inquiry to the 21st Amendment, the court of

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[22] This Court's early cases, *see, e.g.*, *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59 (1936), which involved neither discrimination nor a trade barrier, are sometimes construed to have more broadly interpreted the 21st Amendment in the Commerce Clause context; but in any event, more recent cases consistently have applied precisely the "two-tier" analysis the appeals court below rejected. *See, e.g.*, Silvernail, "Smoke, Mirrors, and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce," 44 *So. Tex. L. Rev.* 499 (2003); Molnar, "Under the Influence: Why Alcohol Direct Shipment Laws are a Violation of the Commerce Clause," 9 *U. Mia. Bus. L. Rev.* 169 (2001); Kozusko, "The Fight to 'Free the Grapes' Enters Federal Court: Constitutional Challenges to the Validity of State Prohibitions on the Direct Shipment of Alcohol," 20 *J. L. & Com.* 75 (2000); Shanker, "Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment," 85 *Va. L. Rev.* 353 (1999).

appeals indulged in precisely the "absurd oversimplification" this Court spurned four decades earlier in *Hostetter*. New York again argues that the 21st Amendment power is plenary. It was wrong in *Hostetter*, and it is wrong here.

3. The appeals court's sweeping view of the 21st Amendment would divest Congress of its power to restrain anticompetitive acts of states with regard to alcohol. Plainly, it has not. In an unbroken line of cases, this Court has affirmed and applied congressional authority in such fashion. *See, e.g.*, *Brown-Forman*, 476 U.S. at 585; *Capital Cities*, 467 U.S. at 715-16; *Midcal*, 445 U.S. at 108-09. Nor is congressional power unexercised in the context presented here, given the clear command of nondiscrimination embodied in the Wilson Act.

4. The same principle controls in the interplay between the dormant Commerce Clause and the 21st Amendment. "When a state statute directly regulates or discriminates against interstate commerce or when its effect to favor in-state economic interests over out-of-state economic interests, we have generally struck the statute down without further inquiry." *Brown-Forman*, 476 U.S. at 579. Indeed, in the very case upon which respondents rely so heavily, *North Dakota v. United States*, 495 U.S. 423 (1990)[23], Justice Scalia hastened to make the very same

[23] That case involved the imposition by the state of certain nondiscriminatory regulations on the federal government's shipments of alcohol to military installations. The Court held that where the State imposes a single set of alcohol importation regulations, the federal government, like everyone else, may be held to comply – a proposition with which petitioners emphatically agree. Justice Scalia made the point that the case would be markedly different if the State imposed two sets of rules, not one. *North Dakota*, 495 U.S. at 444. Then it would be like this case.

point. *Id.* at 444 (Scalia, J., concurring in the judgment) ("All agree in this case that state taxes or regulations that discriminate . . . are invalid"); *id.* at 448 ("That is not to say, of course, that the State may enact regulations that discriminate"). Where a barrier to interstate commerce is presented, the law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring).

The paradigm case for analyzing facially discriminatory barriers to commerce in alcohol is *Bacchus*. There, liquor distributors challenged an exemption by the State of Hawaii of a locally produced brandy from an otherwise applicable excise tax.[24] The exemption was passed, like the New York farm winery exemption here, to benefit local industry.

The Court engaged in the two-part analysis rejected by the appeals court below, declaring that the "question in this case" is "whether the principles underlying the

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[24] The analysis is the same whether the discrimination takes the form of taxation or some other type of regulation. Both taxes and regulations inevitably have an effect on the flow of commerce, as this Court repeatedly has recognized. *See, e.g., Oregon Waste Sys. v. Dep't on Environ. Qual.*, 511 U.S. 93 (1994); *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992); *cf. Bacchus*, 468 U.S. at 268 n.8 ("Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers"). It would make no sense for the Court to strike down a protectionist tax on alcohol while sustaining an even more onerous protectionist regulation on importation, for the effects – and the states' possible justifications – are the same. *Cf. North Dakota v. United States*, 495 U.S. at 444 (Scalia, J., concurring in the judgment) ("All agree in this case that state *taxes or regulations* that discriminate . . . are invalid") (emphasis added).

Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." *Bacchus*, 468 U.S. at 275. It began by examining whether the motive for the exemption was economic protectionism, a finding that "may be made on the basis of discriminatory purpose or discriminatory effect." *Id.* at 270 (citations omitted). As here (Pet. App. 54-55a), the purpose of the exemptions was to advance local industry, and the exemption discriminated against out-of-state products. The Court concluded that the 21st Amendment considerations did not outweigh Commerce Clause concerns, because "one thing is certain: The central purpose of [section 2] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276.

Hence, respondents have it exactly backward: state action related to transportation and importation of alcohol is not shielded from Commerce Clause scrutiny; rather, state action promoting economic protectionism, as manifested by discriminatory trade barriers, is removed from what is otherwise the 21st Amendment's safe harbor for neutral state regulation of trade in alcohol.

Far from aberrational, the *Bacchus* two-part analysis is precisely the framework applied in all such cases of modern vintage, regardless of the type of regulatory impediment at issue. *See, e.g.*, *Healy*, 491 U.S. at 288 n.14; *Brown-Forman*, 476 U.S. at 579; *Capital Cities*, 467 U.S. at 714; *Midcal*, 445 U.S. at 113; *Hostetter*, 377 U.S. at 333-34. *See also Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Dickerson*, 336 F.3d at 396; *Bainbridge v. Turner*, 311 F.3d 1104, 1108-09 (11th Cir. 2002); *Mt. Hood Bev. Co. v. Sebastiani Vineyards, Inc.*, 63 P.3d 779, 786 (Wash. 2003). Indeed, this Court found no impediment to

invalidating, in the face of states' 21st Amendment "core powers" assertions, discriminatory purchase rules in *Craig v. Boren*, 429 U.S. 190 (1976) or advertising restrictions in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996). The glaring exception to this uniform analytical approach is the court of appeals ruling below.

5. The Court of Appeals calls into question all of the law that accords equal dignity to the Commerce Clause and section 2. This body of law readily satisfies the criteria for adherence to *stare decisis* as set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992); *see also United States v. IBM Corp.*, 517 U.S. 843, 856 (1996). No difficulty exists in the practical workability of the nondiscrimination principle: a state has merely to choose a single set of rules regarding direct shipment and apply them to both domestic and out-of-state wineries. Indeed, when this lawsuit began, direct shipping of wine was forbidden by 31 states and permitted only in 19. In just five years, seven states including Mrs. Swedenburg's Virginia have moved into the direct shipment category, so that now over half the states allow direct shipping.[25] The FTC reports that those states are able fully to satisfy their legitimate regulatory concerns without recourse to discriminatory trade barriers. *See* FTC Report at 26-40.

Abandoning the rule of nondiscrimination would impose severe hardship on small wineries such as Mrs. Swedenburg's and Mr. Lucas' that rely heavily upon direct

[25] As discussed in Part IB, *supra*, it is primarily the political influence of the liquor distributors that has prevented New York from abandoning its protectionist regime.

shipments to sell their product. That rule is far from discarded doctrine; indeed, it represents an unbroken line of precedent for 150 years (and applied consistently in the context of alcohol for at least 40 years since *Hostetter*). Those precedents in turn have been faithfully applied by a majority of appeals courts that have decided the question. All of those reasons counsel strongly in favor of adherence to *stare decisis*.

6. In sum, the question posed by the Court has been decided repeatedly and correctly. The desires of Mrs. Swedenburg and Mr. Lucas and their New York customers to transact with one another should be determined by equal and impartial rules, not by rules established to protect local economic interests. The essential jurisprudential mandate of according meaning to all parts of the Constitution, the animating history of both the Commerce Clause and the 21st Amendment, affirmative congressional expression, *stare decisis*, and complementary constitutional provisions all militate in favor of maintaining the rule that discriminatory trade barriers find no shelter in the 21st Amendment.

B. New York's Discriminatory Trade Barrier Cannot Find Sanctuary Within the 21st Amendment.

Though it paid lip service to it, the court below failed to adhere to this Court's command in *Hostetter*, 377 U.S. at 332, that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," and courts should consider "each in the light of the other." *Id.* As the Court emphasized in *Midcal*, 445 U.S. at 109, the judicial task in this area is a "pragmatic effort to harmonize state and federal powers"; not to excise one

constitutional provision to the aggrandizement of the other.

In defiance of the command to accord dignity to both the Commerce Clause and 21st Amendment, the Second Circuit substituted a kind of constitutional one-stop shopping, concluding that New York's direct shipment ban falls within the powers conferred by the 21st Amendment and therefore that it was "exempted" from the Commerce Clause (Pet. App. 16a-29a).[26] Such an approach, according plenary weight to section 2 of the 21st Amendment, nullifies the dormant Commerce Clause, for in the context of alcohol distribution it would preclude nothing that the state might do, including naked economic protectionism. As such a result is starkly contrary to the rule of *Bacchus* and this Court's other precedents harmonizing the two provisions, the Court should examine the New York regulatory scheme in light of both constitutional provisions, not just one.

Respondents, by contrast, contend that striking down protectionist direct shipment bans would eviscerate the 21st Amendment. Hardly: such a ruling would disturb but little the state's broad regulatory powers over alcohol distribution. Consider the many legislative alternatives available to New York that it bypassed in favor of its discriminatory direct shipment ban:

- The State may, of course, prohibit the sale of alcohol altogether.

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[26] By contrast, the district court carefully analyzed the direct shipment ban under both the Commerce Clause and the 21st Amendment (Pet. App. 51a-64a).

• If it were serious about exercising regulatory control, New York could, like several other states, assume direct control through a state system of alcohol distribution outlets.

• The State could require that *all* wine, not just wine delivered from out-of-state wineries, pass through the three-tier system, and/or be subjected to whatever nondiscriminatory regulations it deems appropriate.[27]

• The State could, like other states, create a permit system that would allow direct interstate shipment of wine subject to whatever nondiscriminatory conditions the state might deem appropriate, such as a permit requirement, reasonable fees, taxation, and protections against sales to minors.[28]

All of these policy choices pass muster under the Commerce Clause. It is only because New York bypassed such choices and instead embraced a discriminatory distribution system that its actions are constitutionally suspect. It took one fatal step too far, going beyond even-handed regulation to discriminatory regulation – an act that "eliminates the immunity afforded by the Twenty-first Amendment." *Healy*, 491 U.S. at 344 (Scalia, J., concurring). Such a policy choice in light of nondiscriminatory alternatives reveals the State's protectionist motivations.

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[27] *See, e.g., Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001) (the state "insists that every drop of liquor pass through its three-tiered system").

[28] New York law authorizes the state respondents to create such a permit system, *see* ABC Laws §105-9 (Pet. App. 98a), but respondents have so far chosen not to exercise that discretion.

Because the Second Circuit failed to apply strict scrutiny, or really any meaningful Commerce Clause scrutiny at all, the Second Circuit truncated two essential parts of the State's burden under strict scrutiny: articulating an important state interest and demonstrating that no less-burdensome alternatives could serve those interests. *See, e.g.*, *Hughes*, 441 U.S. at 337; *Hunt*, 432 U.S. at 353. As will appear, the State's defenses are pretextual and cannot satisfy strict scrutiny.

1. What is the legitimate goal that the State seeks to serve with its in-state premises requirement? Purportedly, the court of appeals inferred, to "ensure accountability" (Pet. App. 28a).[29] After all, "[r]equiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless" (Pet. App. 28a).

Such a justification for discriminatory trade barriers was expressly rejected in *Dean Milk*, 340 U.S. at 354-35. Regardless, the underlying premise isn't so: "physical presence," in terms of a bricks-and-mortar business establishment, simply is not necessary to establish accountability to the state. The state has available to it far less-burdensome regulatory mechanisms to ensure accountability.

First, the Tax and Trade Bureau (formerly BATF) has authority to revoke a winery's license if it violates state alcohol control laws (BATF Industry Circular 96-3; J.A.

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[29] Respondents also cite "orderly market conditions," which the 7th Circuit characterized as "a euphemism for reducing competition and facilitating tax collection." *Bridenbaugh*, 227 F.3d at 851.

196-97; 2d Cir. J.A. 3581-82). In other words, just like New York wineries, out-of-state wineries are subject to severe penalties if they violate New York laws. Moreover, the 21st Amendment Enforcement Act, 27 U.S.C. §122a (Pet. App. 76a), solved the conundrum voiced by the appeals court, investing in state attorneys general the power to seek injunctions against unlawful acts by out-of-state wineries in their own federal courts.[30] Taken together, those protections reflect an affirmative exercise of federal regulatory authority to satisfy state concerns and thereby implicitly remove any justification for protectionist state trade barriers.

The State overlooked the simplest, least restrictive, and most effective means of ensuring accountability: requiring a permit as a condition of direct interstate shipping. Such an effort would put out-of-state and domestic wineries on the same footing: to borrow the appeals court's phraseology, it would make both licensed by and accountable to the State. The State Liquor Authority already possesses authority to issue such permits (*see* ABC Laws §105-9 (Pet. App. 98a)), but has chosen not to exercise it. The State cannot be heard to say, as the Second Circuit found (Pet. App. 25a-28a), that there really is a level regulatory playing field because all wineries that ship directly to consumers must be licensed by and accountable to the state – and then defeat the Commerce

[30] In subsection (e), Congress noted that this authority extends only to the enforcement of laws that reflect "a valid exercise of power vested in the States – (1) under the twenty-first . . . amendment to the Constitution . . . as such . . . amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution." 27 U.S.C. §122a(e).

Clause merely by choosing not to make such a permit available.

Such a permit is precisely the means employed by states that permit and regulate direct interstate shipping; and those states report that such methods fully satisfy legitimate state regulatory interests. FTC Report at 26-40.

Such evenhanded regulation serves the State's interests under the 21st Amendment even as it promotes the values underlying the Commerce Clause. As the FTC has found in the specific context of New York (*see* FTC Letter, *supra*), a permit system allowing direct interstate wine shipments would benefit wine producers and consumers, while satisfying legitimate State concerns.

2. Taxation, along with protectionism, unquestionably was on the mind of the legislators who tightened the vice-grip on direct interstate wine shipments in 1970 and when Gov. Pataki vetoed reform legislation in 1995. But is a constitutional maxim that "revenue generation is not a local interest that can justify discrimination against interstate commerce." *C&A Carbone*, 511 U.S. at 393.

Respondents have made completely contradictory arguments in this regard. They insist on the one hand that taxation is a "core concern" under the 21st Amendment, *see North Dakota v. United States*, 495 U.S. 423 (1990); and on the other that states are somehow not allowed to tax direct interstate shipments of alcohol. Those assertions can't both be true: either taxation is a core concern, and therefore the State *can* tax direct interstate shipments of alcohol pursuant to their 21st Amendment powers; or it is not and the State cannot. It is absurd to argue, as respondents do, that the 21st Amendment encompasses the

broader power of discriminatory trade barriers, but not the lesser power of equal taxation.

Whether or not the State possesses the tax power, it is plain that what the State cannot do is to discriminate. *See Bacchus*, 468 U.S. at 270; *North Dakota*, 495 U.S. at 448 (Scalia, J., concurring) ("That is not to say, of course, that the State may enact regulations that discriminate"). "States have broad discretion to configure their systems of taxation as they deem appropriate. All we intimate here is that their discretion in this regard, as in all others, is bounded by any relevant limitations of the Federal Constitution, in these cases the negative Commerce Clause." *Oregon Waste*, 511 U.S. at 108 (citations omitted).

But the fact is that several states *do* tax direct interstate wine shipments. *See, e.g.*, La. Rev. Stat. Ann. §26:359(B)(1); N.H. Rev. Stats. Ann. §178:14-a(V); Nev. Rev. Stat. Ann. §369.462. Wineries that engage in direct shipping remit taxes to states that require them (J.A. 46-47; 2d Cir. J.A. 3596). The FTC reports that states are successfully collecting taxes on direct wine shipments. FTC Report at 38-40. Indeed, far from taxation providing a rationale for forbidding direct interstate shipping, states may find that they are *losing* tax revenues by such protectionist policies.[31] At bottom, while revenue interests plainly can serve as a justification for state regulation, they cannot serve as an excuse for discrimination; or to avoid less-burdensome alternatives, such as those that other states have adopted

[31] Indeed, that appears to be the reason for the about-face by Gov. George Pataki, who vetoed a 1995 bill authorizing direct shipping based in part on tax revenue concerns; but eight years later, now supports such legislation, citing the prospect of increased tax revenues. *See* Wax, "State Foresees $3M Yearly in Wine Bill," *Newsday* (Jan. 23, 2004).

to the betterment of producers, consumers, and the states themselves.

3. We expect that the Court will be flooded with good-faith *amicus* briefs raising concerns about underage access to alcohol. With such concerns we strongly empathize. But we urge the Court to focus on the *legal* issues evoked by the deployment of a discriminatory regime ostensibly to serve legitimate purposes; to wit, whether the proffered reason actually motivated the legislature and whether less-burdensome alternatives exist. If the Court does so, it will see why not a single standing court decision has credited temperance concerns as a legitimate justification for discriminatory direct shipment bans, and why the district court below likewise rejected it (Pet. App. 58a).

Respondents cannot meet their burden here for three independent reasons: (1) no evidence exists that direct shipping would exacerbate the problem of underage drinking; (2) the same concerns would apply to in-state direct shipping, so that differential treatment of the two renders the defense pretextual; and (3) less-burdensome means exist to serve the state's professed interests.

The entire legislative history of the 1970 law tightening direct interstate shipment access and the 1995 legislation that would have lifted the ban lacks virtually any reference to concern over underage drinking. (2d Cir. J.A. 367-436, 437-536).

The reason, as the FTC Report at 26-38 makes clear, is that underage access through direct shipping is not a

problem in the states that permit (and regulate) it.[32] That is because while direct shipping efficiently serves the interests of adult wine enthusiasts who want to find a particular wine that they enjoy, it is a very clumsy and inefficient way for minors to obtain alcohol, particularly in light of (unfortunately) abundant alternatives. Young drinkers prefer beer and wine coolers, not premium wine (2d Cir. J.A. 2914-18, 2920-21, 2923-26, 2967-68, 3037-38, 3049, 3055-57); and they can obtain it easily with fake IDs or by having adult friends purchase it. For wine ordered by telephone or over the Internet, by contrast, customers must produce an adult identification at time of purchase. They must order it with a credit card. They must wait an unspecified period of time for delivery. The package is marked to require adult identification upon delivery (thereby creating a second identification checkpoint). And the young person would have to be home without a parent (or the college campus would have to

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[32] Apart from the FTC report, which surveyed and heard testimony from enforcement officials and found no problem with underage access in direct shipment states, there is *no* study examining effects of direct shipping on underage access. Widely reported sting operations have taken place in states that *forbid* direct interstate shipping, thereby not testing enforcement methods of states that allow and regulate it. A National Academy of Sciences study that reported widespread use of the Internet by minors to order alcohol relied on a study that, in fact, related entirely to minors ordering alcohol from *liquor stores*; i.e., through the three-tier system. *See* Bonnie and O'Connell, eds., *Reducing Underage Drinking: A Collective Responsibility* (2004) at 174; Fletcher, et al., "Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers," 61 *J. Studies Alcohol* 81 (2000). Respondents often cite to a study showing greater wine consumption in states with more permissive alcohol laws – as if there is something wrongful in itself about wine consumption. Correlation does not equal causation – and no studies that respondents have produced (including reports by their own expert witnesses) have examined, much less established, any direct link between direct shipping and underage access. By contrast, in terms of underage access, the three-tier system leaks like a sieve.

permit delivery) in order to complete the transaction. These are industry standards that have been adopted in many jurisdictions (J.A. 44; 2d Cir. J.A. 3529-32, 3581, 3596).

In New York, the statistics of record are glaringly clear: 16,000 and zero. The first is the number of reported instances of underage access through the three-tier system over a five-year period; the second is the number of reported instances of underage access through direct shipping outside the sting context during the same period (2d Cir. J.A. 537-38).

Moreover, the State's concerns about underage access through direct shipping ring hollow when one examines the regulatory treatment of in-state wineries engaged in direct shipping, which in its full sweep and scope amounts to *none whatsoever* (J.A. 43-44). By contrast, the vetoed 1995 direct interstate shipping bill would have required safeguards against underage access (2d Cir. J.A. 449-53).

The same regulatory concerns with regard to underage access should apply to in-state and out-of-state wineries. Even absent state regulation, a winery can lose its federal license, and its ability to operate at all, if it violates state laws (BATF Industry Circular; J.A. 196-97; 2d Cir. J.A. 3581-82). In light of the existence of less-burdensome alternatives (recognized even by the New York Legislature in 1995) when it attempted to allow limited and regulated interstate direct shipping, the State cannot explain why it needs to erect a discriminatory trade barrier in order to serve its legitimate objectives. It cannot do so because its true objective was protectionism. However laudable the ostensible goal, it cannot provide cover for the real one.

CONCLUSION

By a decision in favor of Mrs. Swedenburg and her fellow petitioners, this Court will reaffirm that the founding principles of our nation – especially the guarantee of free trade among the states – will continue to resonate in the Internet era. Though technology has made so much possible, it is still small craftspersons like Mrs. Swedenburg, along with their customers, who benefit most from the wisdom of the Framers enshrined in our Constitution. Protectionist schemes never disappear; but they will be held in check only if the Court binds states to their legitimate authority.

For the foregoing reasons, petitioners respectfully request that the Court reverse the decision of the Court of Appeals and remand the case to the District Court for implementation of its original Order.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE OF NEW YORK RESPONDENTS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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POINT I

THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT EMPOWER THE STATES TO ENACT REASONABLE REGULATIONS GOVERNING THE TRANSPORTATION AND IMPORTATION OF ALCOHOL WITHOUT RUNNING AFOUL OF THE DORMANT COMMERCE CLAUSE 12

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STATEMENT OF THE CASE

A. The Regulation of Alcohol in New York State

Since the repeal of Prohibition, New York has closely regulated the importation, distribution, and sale of alcoholic beverages. Like many other states, New York employs a three-tiered system for the distribution of alcohol. The fundamental feature of this scheme is that all alcohol intended for distribution and use within the state must pass through the hands of at least one state-licensed entity. *See* N.Y. Alcoholic Beverage Control Law ("ABC") § 100(1) (McKinney's 2000 & Supp. 2004).

1. New York's licensing scheme advances the purposes of the Twenty-First Amendment in several important ways. First, it enables the State to carefully control who may manufacture, distribute, or sell alcoholic beverages. The rigorous application process set forth in the ABC Law ensures that licenses will be issued only to persons of good character and for businesses and premises that will serve the public interest. The New York State Liquor Authority ("SLA" or "Authority"), which enforces the ABC Law, must "carefully evaluate the character, fitness, experience, maturity and financial responsibility of each [license] applicant." 9 N.Y.C.R.R. § 48.7 (2004). Local publication of applications ensures public participation in this process. ABC § 110-a. A licensee must be at least twenty-one years of age and a U.S. citizen or lawful permanent resident, and a person convicted of a felony or certain misdemeanors is prohibited from holding a license. ABC § 126(1), (2), (3). In considering applications, the SLA may take into account the location of the premises and may limit the number of licenses granted in order to strengthen profitability and promote compliance with state law – a mechanism identified and widely employed

after the repeal of Prohibition to this end. *See* ABC §§ 2, 64(6-a)(a); *see also* Leonard V. Harrison & Elizabeth Laine, *After Repeal: A Study of Liquor Control Administration* 95-96 (1936); Randolph W. Childs, *Making Repeal Work* 253 (1947); *1954 Rep. of the Activities of the State Liquor Authority* 11-13; *In re Hanson v. State Liquor Auth.*, 430 N.Y.S.2d 395, 396-97 (App. Div.), *aff'd* 53 N.Y.2d 693, 421 N.E.2d 504 (1981) (upholding licensing determination based on profitability assessment).

Second, restricting traffic in alcohol to licensed entities enables New York to comprehensively regulate their activities. These restrictions include the familiar prohibition of sales to minors and limitations on business hours. ABC §§ 65, 105(14), 106(5). The State also regulates financial relationships among manufacturers, wholesalers, and retailers, and in particular prohibits a "tied house," in which a manufacturer or a wholesaler holds a financial interest in a retailer – a corporate structure considered a major cause of excessive alcohol consumption before Prohibition. *See* ABC §§ 101, 105(16)&(17), 106(13)&(14); Aff. of Thomas G. McKeon ("McKeon Aff.") ¶¶ 26-34 (J.A. 152-55); *After Repeal* 97-99.

Additionally, New York regulates the manner in which manufacturers, wholesalers, and retailers may price goods and make sales. New York requires that every brand of alcohol be registered with the SLA, and that no alcohol be sold without a label displaying the brand name. ABC § 107-a. Liquor and wine manufacturers and wholesalers must file price schedules with the SLA and may not price-discriminate among purchasers. ABC § 101-b(2)&(3). The ABC Law also restricts where retail establishments may be located; how they may price, peddle, and market alcoholic beverages, including

by prohibiting practices like house-to-house sales and unlimited drink offers; and what other businesses they may engage in. ABC §§ 63(4), 102(4)&(5), 105(3)&(10), 117-a. Additionally, the law makes it considerably easier to sell wine or beer than hard liquor. *See* ABC §§ 54 (license for grocery stores to sell beer), 54-a (license for grocery stores to sell beer and wine), 105-a (sale of beer on Sundays). Finally, excise and sales taxes are levied on all alcohol sold within the State, and licensees must keep various records related to the excise tax. *See* N.Y. Tax Law art. 18, §§ 420-445 (excise tax); 20 N.Y.C.R.R. §§ 60.1 *et seq.* (2004) (excise tax); N.Y. Tax Law § 1105(a)&(d) (sales tax).

2. New York's licensing system is essential to the States' ability to supervise the manufacture, distribution, and sale of alcoholic beverages and to enforce its regulations governing these activities. Efficient enforcement is critical given the number of businesses that traffic in alcohol and the substantial task of overseeing these entities. In 2000, there were 47,751 active licenses. During that year, the SLA issued 5,310 investigation orders and imposed 4,193 penalties, of which 2,025 were for sales to minors. *2000 State Liquor Authority Ann. Rep.* 7, 11, 14 (2d Cir. J.A. 1574, 1578, 1581).

The requirement that all entities manufacturing, distributing or selling alcoholic beverages be licensed allows enforcement authorities to effectively monitor their activities. Licensing ensures that the SLA knows the identities and locations of all industry participants. Licensees must maintain adequate books and records on premises and make them available for inspection, *see* ABC §§ 103(7) (manufacturers), 104(10) (wholesalers), 105(15) (retailers for off-premise consumption), 106(12) (retailers for on-premise consumption), a requirement which aids the SLA in tracking

the distribution of alcohol and identifying and addressing unlawful diversion. Additionally, the SLA may inspect any premises where alcoholic beverages are manufactured or sold, *see* ABC § 18(4), and local law enforcement agencies assist the SLA in monitoring licensees by inspecting premises and reporting arrests or convictions for certain unlawful activities occurring at licensed premises, *see* ABC §§ 106(15), 106-a; McKeon Aff. ¶ 23 (J.A. 151); *1948 Ann. Rep. of the State Liquor Authority* 7-10.

License revocation is perhaps the SLA's most powerful administrative penalty.[1] Persons who have had alcoholic beverage licenses revoked, or who have been convicted of a violation of the ABC Law, are forbidden to hold a license for two years. ABC § 126(5). In addition, under New York law a license is confined to a particular premises, ABC § 111, and the SLA may, for a period of two years, deny a license to operate at a premises where a license has previously been revoked, ABC § 113(1); *see also* ABC §§ 64(6-a)(e), 106(1). Where revocation results from sale to a minor, an application to operate in the same premises must be denied for two years unless the new applicant acquired the premises through an arms-length transaction. ABC § 113(2). The SLA may also refuse to renew a license if local law enforcement

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1. Disciplinary penalties the SLA is authorized to impose include license revocation, cancellation, or suspension, and the imposition of a civil money penalty of up to $10,000 for most retail licensees, with greater civil money penalties provided for manufacturers and wholesalers. ABC § 17(3). Violations can result in a full or partial forfeiture of the penal bond required of all licensees in the amount established by Rule 9 of the Rules of the State Liquor Authority. ABC § 112; 9 N.Y.C.R.R. § 81.3 (2004). Most violations of the ABC Law are also misdemeanors subject to criminal prosecution. ABC § 130(3).

officials have reported the existence of unlawful activities at a particular premises. *See In re Rose Garden Rest. Corp. v. Hostetter*, 300 N.Y.S.2d 948, 951-52 (App. Div. 1969); *Oval Bar & Rest. v. Bruckman*, 30 N.Y.S.2d 394, 396 (Sup. Ct. 1941). In the year 2000, the SLA revoked 93 licenses, cancelled 292 licenses, and suspended 186 licenses. *2000 State Liquor Authority Ann. Rep.* 14 (2d Cir. J.A. 1581).

3. Petitioners' objections to New York's regulatory scheme revolve around three elements of the ABC Law: the requirement that all alcoholic beverages imported into the State pass through the hands of a licensed entity (§ 102(1)(c)&(d)); the authorization for any licensed winery – whether in-state or out-of-state – to ship directly to consumers (§ 77(2)); and the requirement that all licensed wineries have an in-state presence (§ 3(37)).

Petitioners challenge only the first of these requirements, sections 102(1)(c) and (d). *See* Compl. ¶¶ A, B (J.A. 33); Stipulation of the Parties dated Mar. 28, 2001 (2d Cir., JA. 1201-09). These provisions, which apply to "importation or distribution for commercial purposes, for personal use, or otherwise," prohibit persons and common carriers from shipping alcohol into New York State "unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." ABC § 102(1)(c), (d), (e). Many other states similarly restrict the shipment of alcoholic beverages. *See* Brief of Amici Curiae Ohio *et al.* ("Ohio Br.") at 13 (No. 03-1116).

While petitioners maintain that this requirement dates from 1970, *see* Pet. Br. at 3, 19, in fact it was included in the 1934 enactment of the ABC Law, which prohibited the

importation of "liquors and/or wines" into the State "unless the same shall be consigned to a person duly licensed hereunder," whether such alcohol was "intended for personal use, as well as otherwise." Act of May 10, 1934, ch. 478, § 102(1)(c), (d), (e), 1934 N.Y. Laws 1079, 1103-04 (hereinafter "1934 ABC") (2d Cir. J.A. 3662-63). Until 1964, the SLA construed this language to prohibit direct shipment from unlicensed out-of-state businesses to in-state consumers. That year, the New York Court of Appeals ruled that sections 102(1)(c) and (d) were "directed not at a shipment to a person who has purchased liquor for his own personal use but solely at shipments to those who are engaged in the liquor business and have purchased the alcoholic beverages outside the State for resale." *Essenfeld Bros., Inc. v. Hostetter*, 14 N.Y.2d 47, 52-53, 197 N.E.2d 535, 537 (1964). The 1970 amendments to sections 102(1)(c) and (d) that petitioners reference were enacted in response to *Essenfeld* and were intended to restore the SLA's long-standing interpretation of those provisions. *See infra* at 35-36.

The second provision, section 77(2), authorizes licensed wineries to ship their products directly to New York consumers. Licenses are available both to wineries located within the State and to out-of-state wineries that maintain an in-state presence. *See* ABC § 3(37). Section 77(2) provides that for a $125 annual fee, a winery licensee can obtain a certificate "authorizing such winery to sell wine at retail in sealed containers . . . to a householder for consumption in his home." While this section does not explicitly authorize wineries to ship to householders, its legislative history, which dates back to 1934, clearly indicates that intent, and the SLA

has consistently so interpreted the provision.[2] Accordingly, a licensed New York winery, regardless of whether it is an in-state or out-of-state business, may ship wines directly to consumers.

The third provision, section 3(37), requires that a licensed winery maintain an in-state presence. Petitioners do not claim to have applied for a winery license, and neither the SLA nor the New York courts have had occasion to interpret this requirement. *See* McKeon Aff. ¶ 43 (J.A. 159-60).[3] The statute requires only that an

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2. The 1934 ABC Law permitted wineries to sell wine at retail for a $100 fee, as long as the wine was "delivered to a house-holder for consumption in his home." 1934 ABC § 77 at 1096-97 (2d Cir. J.A. 3655-56). As a result of amendments in 1944 and 1946, section 77 eventually provided for two separate permits, each costing $100; section 77(2) allowed on-premises retail sales, while section 77(3) allowed off-premises retail sales by delivery or shipment. Act of Apr. 14, 1944, ch. 796, 1944 N.Y. Laws 1758, 1758-59; Act of Apr. 8, 1946, ch. 572, 1944 N.Y. Laws 1215, 1216. In 1977, the legislature repealed section 77(3)'s separate provision for retail sales by delivery or shipment, Act of Aug. 9, 1977, ch. 602, § 77(2), 1977 McKinney's N.Y. Laws 876, 877, in order "to consolidate [the] two . . . fees into a single $125 fee," Mem. of the State Exec. Dep't, ch. 602, *reprinted in* 1977 McKinney's N.Y. Laws 2382.

3. The option for an out-of-state winery to obtain a New York license is readily discernable from the face of § 3(37) and has long been recognized within the industry. *See* Letter from John B. Walsh to Mario M. Cuomo, Governor (July 11, 1984), *reprinted in* Bill Jacket for ch. 501 (1984), at 24 (arguing that because "the definition of 'winery' in the Alcoholic Beverage Control Law includes anyone that manufactures wine in the United States with a branch office in New York State, any winery such as Gallo or Inglebrook could be a wholesaler of New York labelled wines, as well as their own wine").

out-of-state winery (1) maintain "a branch factory, office or storeroom" in New York State, and (2) receive shipments of wine "consigned to a United States government bonded winery, warehouse or storeroom located within the state." ABC § 3(37). On its face, section 3(37) does not require that the in-state premises be occupied exclusively by the licensee, be fully staffed, or meet any of the other criteria alleged by the petitioners. *Cf.* Pet. Br. at 5, 21 n.15, 28. Petitioners' characterization of this provision is based entirely on a 1953 SLA bulletin that described the requirements for out-of-state wholesalers, not wineries. It might be that section 3(37) could be satisfied, for example, by jointly leasing an office with other out-of-state wineries and by sub-leasing space in a bonded warehouse in New York State.

B. Proceedings Below

1. District Court

Petitioners, two proprietors of out-of-state wineries and three New York State residents who consume wine, filed suit against the Chairman and Commissioners of the New York State Liquor Authority on February 3, 2000, requesting that the court declare ABC Law sections 102(1)(a), (c), and (d) facially unconstitutional. Compl. ¶¶ 4-9, A (J.A. 24-25, 33). They maintained that these provisions violated the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, by preventing the wineries from shipping directly to the New York consumers and the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, by abridging the wineries' economic liberty, and that section 102(1)(a) violated the First Amendment, U.S. Const. amend. I, by prohibiting out-of-state merchants from soliciting orders for alcohol. Compl. ¶¶ 38, 46, 54 (J.A. 30, 32, 33).

On November 12, 2002, the district court granted petitioners' motion for summary judgment and declared that sections 102(1)(c) and (d) violated the dormant Commerce Clause. Pet. App. 34a, 53a. The district court found the ABC Law discriminatory on its face under traditional dormant Commerce Clause analysis and therefore "a per se violation of the Commerce Clause." *Id.* at 57a. The court then reasoned that the statute was not "saved" because "viable" regulatory alternatives were available to the State, and concluded that it violated the Commerce Clause. *Id.* at 57a-58a. The district court further held that section 102(1)(a) prohibited solicitation of lawful acts and therefore violated the First Amendment. *Id.* at 67a-68a. It did not reach petitioners' Privileges and Immunities Clause claim. *Id.* at 67a.

2. Court of Appeals

The Second Circuit reversed, holding that sections 102(1)(c) and (d) do not violate the Commerce Clause. *Id.* at 1a, 29a. Recognizing that "both the Twenty-First Amendment and the Commerce Clause are parts of the same constitution" and should be considered "each in the light of the other," *id.* at 13a (internal quotations omitted), the Second Circuit observed that this Court has "consistently recognized only that, under section 2, a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate *beyond* the state's borders or to preserve fundamental rights," *id.* at 17a (emphasis in original). It concluded that the ABC Law "falls squarely within the ambit of section 2's grant of authority," since "[t]he statutory scheme regulates only the importation and distribution of alcohol in New York." *Id.* at 25a.

With respect to this Court's holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), that state laws which constitute "mere economic protectionism" fall outside the Twenty-First Amendment's scope, the Second Circuit found "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests," Pet. App. 25a. Wine importers and in-state sellers alike "must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol." *Id.* at 26a. The court further concluded that this physical presence requirement "is aimed at . . . regulatory interests directly tied to the importation and transportation of alcohol for use in New York," *id.* at 27a, because "presence ensures accountability," *id.* at 25a.

Having rejected petitioners' dormant Commerce Clause challenge, the Second Circuit held that New York's law did not violate the Privileges and Immunities Clause because it operated without regard to residency and did not confer advantages on New York residents that were unavailable to nonresidents. *Id.* at 29a-30a. Additionally, the court affirmed the ruling that section 102(1)(a) violated the First Amendment. *Id.* at 33a. (Neither party challenges this aspect of the Second Circuit's ruling.)

On May 24, 2003, this Court granted certiorari in this case (No. 03-1274) and consolidated it with two other petitions for certiorari (Nos. 03-1120, 03-1116) seeking review of the Sixth Circuit's decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), invalidating Michigan's similar regulatory structure.

SUMMARY OF ARGUMENT

The plain language of both the Twenty-First Amendment and the Webb-Kenyon Act grant states virtually unfettered authority to regulate the importation of alcoholic beverages for delivery or use within their borders. The legislative history and historical context of these provisions makes clear that they were intended to shield state regulation from the impediments otherwise posed by the dormant Commerce Clause.

This Court has repeatedly affirmed that while the Twenty-First Amendment does not permit states to ignore other provisions of the Constitution, it does exempt rational state regulation of alcohol importation from the operation of the dormant Commerce Clause. Petitioners, relying primarily on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), suggest that the Amendment has little, if any, impact on the states' authority to regulate alcohol. But *Bacchus* addressed only an exemption for local liquor producers that was enacted exclusively for protectionist reasons; it says nothing about state regulations that actually are animated by and promote the legitimate purposes recognized by the Twenty-First Amendment. It does not call into question the constitutionality of regulatory schemes that ensure accountability and compliance with the law by channeling traffic in alcohol through licensed businesses.

The provisions of the ABC Law challenged by petitioners are not just reasonable, but are essential to promoting temperance and an orderly market in alcohol, and to collecting applicable taxes. New York requires that all alcoholic beverages intended for distribution and use within the State pass through the hands of a licensee with an in-state presence. It has done so because channeling the flow of alcohol in this way allows the State to effectively monitor alcohol distribution and enforce its liquor laws. While petitioners complain that the State's restrictions on

direct shipment impose additional costs on out-of-state businesses, this Court has repeatedly upheld laws directed at out-of-state alcohol purveyors as necessary to ensuring compliance with the state's regulatory regime. New York's laws are thus well within the authority granted by the Twenty-First Amendment and are fully constitutional.

ARGUMENT

POINT I

THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT EMPOWER THE STATES TO ENACT REASONABLE REGULATIONS GOVERNING THE TRANSPORTATION AND IMPORTATION OF ALCOHOL WITHOUT RUNNING AFOUL OF THE DORMANT COMMERCE CLAUSE

The plain texts of both the Twenty-First Amendment and the Webb-Kenyon Act foreclose petitioners' challenge to New York's laws governing the direct shipment of alcoholic beverages. As this Court has repeatedly observed, the Twenty-First Amendment expressly gives states virtually plenary power to regulate the "transportation or importation" of alcohol into their borders for "delivery or use therein." U.S. Const. amend. XXI, § 2. That is exactly the activity governed by New York's requirement that all wineries, whether in-state or out-of-state, obtain a license and maintain an in-state presence in order to ship their wines directly to New York consumers. Similarly, by enacting the Webb-Kenyon Act, Act of Mar. 1, 1913, ch. 90, 37 Stat. 699 (codified as amended at 27 U.S.C. § 122 (2004)), which explicitly authorizes the states to regulate the shipment of alcohol into their borders, Congress has nullified the restrictions of the dormant Commerce Clause that would otherwise apply to state

regulation of trade in alcohol. Legislative history confirms an expansive view of the authority that these provisions confer upon the states.

The decisions of this Court affirm that the Twenty-First Amendment exempts state regulation of the importation of alcoholic beverages from operation of the dormant Commerce Clause. While the Twenty-First Amendment does not authorize states to violate other provisions of the Constitution, the Court has consistently upheld any regulation that rationally furthers the states' broad interests in channeling the flow of alcohol within their borders.

A. The Plain Texts of the Twenty-First Amendment and the Webb-Kenyon Act Grant Each State Unfettered Authority to Regulate the Importation of Alcoholic Beverages for Use Within Its Borders

1. The Twenty-First Amendment

Section Two of the Twenty-First Amendment provides that:

> The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2. The text explicitly and unambiguously authorizes a state to bar alcohol importation that does not conform to its scheme for regulating distribution and sale of alcohol. As this Court has held, "the language of the Amendment is clear." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936). "The words

used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it proscribes." *Id.* at 62.

Nothing in the text of the Twenty-First Amendment subjects this broad grant of power to the constraints otherwise imposed on state regulation of other products by the dormant Commerce Clause. In light of the repeated invalidation of state laws governing alcohol importation before Prohibition, and the clear intent of Congress to safeguard those regulations against further challenge, *see infra* at 20-22, Congress surely would have made such a restriction explicit had it intended to limit state authority in such a manner. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says . . . what it means and means . . . what it says.").

2. The Webb-Kenyon Act

In 1913, in response to a series of this Court's decisions invalidating state regulation of the transportation and importation of alcohol, Congress enacted the Webb-Kenyon Act. It provides in pertinent part that:

> The shipment or transportation, in any manner or by any means whatsoever, of . . . intoxicating liquor of any kind from one State, Territory, or District of the United States . . . into any other State, Territory, or District of the United States . . . intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory,

> or District of the United States . . . is hereby prohibited.

37 Stat. at 699-700. In 1935, after passage of the Twenty-First Amendment, Congress reenacted the Webb-Kenyon Act, Act of Aug. 27, 1935, ch. 740, § 202(b), 49 Stat. 872, 877-78, in response to concerns that the enactment of other statutes in conjunction with repeal could be misconstrued as having implicitly overruled Webb-Kenyon. *See* Ralph L. Wiser & Richard L. Arledge, Note, *Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce?*, 7 Geo. Wash. L. Rev. 402, 407 (1938-1939).[4]

Congress's power to authorize state laws that would otherwise violate the dormant Commerce Clause has been affirmed by this Court for over a century. *See In re Rahrer*, 140 U.S. 545, 562 (1891) (upholding Wilson Act because Congress may "provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character"); *see also South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984) ("Congress may redefine the distribution of power over interstate commerce by permitting the states to regulate the commerce in a manner which would otherwise not be permissible.") (internal quotations omitted); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434-35 (1946) (affirmative Commerce Clause's

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4. By reenacting Webb-Kenyon without change, Congress clearly intended to reaffirm the broad understanding of the Act articulated by this Court in *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 323-25 (1917), as exempting state regulation of alcohol importation from the restraints of the dormant Commerce Clause. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

"plenary scope enables Congress not only to promote but also to prohibit interstate commerce"). Where Congress provides such authority, state regulation of interstate commerce is "invulnerable to a Commerce Clause challenge" – even where such regulation is "discriminatory" with respect to out-of-state firms. *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653, 654 (1981). Indeed, once Congress has acted, the Commerce Clause is no longer dormant, and "courts are not free to review state . . . regulations under the dormant Commerce Clause." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

B. The Purpose of the Twenty-First Amendment and the Webb-Kenyon Act Was to Exempt State Regulations Governing Importation of Alcoholic Beverages From the Ordinary Operation of the Dormant Commerce Clause

Not only are the plain texts of the Twenty-First Amendment and the Webb-Kenyon Act unambiguous, but their historical context confirms that they were intended to allow states to enact importation restrictions free from the strictures of the dormant Commerce Clause. In the decades preceding the enactment of Webb-Kenyon, states had sought to control the distribution of alcohol within their borders, either by becoming "dry" states, or by remaining "wet" but restricting sales and channeling distribution through licensed entities to ensure regulatory compliance. These attempts, however, were repeatedly thwarted by judicial invalidation of state laws under the dormant Commerce Clause. The statutory and constitutional grants of authority embodied in Webb-Kenyon and the Twenty-First Amendment represent efforts to end this tug-of-war by affirming the right of states

to regulate alcohol importation and distribution. While petitioners imply that the language of both provisions is simply hortatory in light of the dormant Commerce Clause, *see* Pet. Br. at 12-24, 32-34, the history of those provisions proves otherwise.

1. When states in the nineteenth century sought to regulate the distribution and sale of alcoholic beverages, alcohol purveyors challenged these laws under the dormant Commerce Clause. The first of these cases to reach this Court were the *License Cases*, 46 U.S. (5 How.) 504 (1847), which involved challenges to laws in Massachusetts, Rhode Island and New Hampshire requiring a license to sell alcohol. The Court uniformly rejected these attacks, recognizing that states had broad authority to regulate traffic in alcohol within their borders "free from implied Commerce Clause impediments." *Craig v. Boren*, 429 U.S. 190, 205 (1972) (describing the *License Cases*). In 1887, a broad view of state authority to regulate or prohibit entirely the manufacture and sale of alcohol was again upheld, this time against a due process challenge. *Mugler v. Kansas*, 123 U.S. 623 (1887).

Just one year later, however, this Court invalidated an Iowa statute that required a permit to import alcohol into the state, on the ground that the dormant Commerce Clause prohibited state regulation of alcoholic beverages until physically delivered in the state. *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888). In response, Iowa passed a new statute, this time restricting the distribution and sale of alcohol as soon as it entered the state. This Court invalidated the second law as well, holding that any restriction on alcohol importation was an impermissible restraint on interstate commerce, so long as the alcohol remained in its original packaging. *Leisy v. Hardin*, 135 U.S.

100, 124-25 (1890). As a result, states were effectively stripped of their ability to control the distribution and sale of alcohol. Whatever restrictions states might place on domestic products could easily be evaded by importing alcoholic beverages directly to consumers in their original packages.

Congress immediately moved to close this loophole by enacting the Wilson Act, which provided that the states could regulate alcohol "upon arrival" in the state, regardless of whether it remained in its original package. Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (presently codified at 27 U.S.C. § 121 (2004)).[5] This Court upheld this exercise by Congress of its affirmative Commerce Clause power in *In re Rahrer*, 140 U.S. at 562. But soon thereafter, it significantly narrowed the Wilson Act's scope, holding that alcohol would not be deemed to have "arrived" in a state until received by the consignee. *Rhodes v. Iowa*, 170 U.S. 412, 421-23 (1898). Once again, state laws that channeled or prohibited

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5. Petitioners point to the Wilson Act's directive that liquor transported into a state be "subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State," 27 U.S.C. § 121, as supporting their argument that New York cannot impose its license requirement on out-of-state wineries. Pet. Br. at 32. But New York's law is in complete accord with the Wilson Act, since it requires that both in-state and out-of-state wineries obtain licenses and maintain an in-state presence before they can directly ship wine to consumers. In any event, the Wilson Act's legislative history confirms that its mandate of equal regulation was motivated by concern about the advantage enjoyed by out-of-state vendors who had been able to elude state regulations. *See* 21 Cong. Rec. 5325-26 (1890) (statement of Sen. George). That same concern motivated enactment of sections 3(37) and 102(1)(c) and (d) of the ABC Law. *See infra* at 35-37.

importation could be avoided by shipping alcohol directly to consumers.

In 1913, Congress again acted to restore the states' ability to regulate alcohol and passed the Webb-Kenyon Act. Entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," 37 Stat. at 699, Webb-Kenyon was directly aimed at eliminating the dormant Commerce Clause impediments that had frustrated state regulation of alcoholic beverages. As one of its sponsors stated, "[t]his bill is intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State"; it "might well be styled a local-option act to give the various States the power to control liquor traffic as to them may seem best. It would remove the shackles of interstate-commerce law from the action of the States." 49 Cong. Rec. 2805 (1913) (statement of Rep. Webb).

In enacting Webb-Kenyon, Congress considered and rejected a provision that would have exempted from state regulation the direct shipment of alcohol to consumers for personal use. *See id.* at 2789 (proposed amendment of Rep. Blackmon). The provision's opponents observed that it would undercut the objective of the Act by "compel[ling] the States to allow . . . people to receive . . . liquor, although their own citizens are not permitted to sell it to such persons." *Id.* at 2807 (statement of Rep. Webb); *see also id.* (personal-use amendment would leave states "powerless to prohibit what every State now prohibits, viz., the reception of liquor by a minor under the age of 16 years").

In 1917, a divided Court affirmed the constitutionality of the Webb-Kenyon Act. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917). The Court confirmed

that Webb-Kenyon divested alcohol of its interstate character for purposes of state regulation of the shipment or transportation of alcohol into its borders. *Id.* at 321-25; *see also McCormick & Co. v. Brown*, 286 U.S. 131, 141 (1932) (Webb-Kenyon's "intended application [was] to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions" against alcoholic beverages.). The Court further held that Congress had permissibly exercised its affirmative commerce power in enacting the statute, rather than delegating it to the states. *Clark*, 242 U.S. at 326.

2. With ratification of the Eighteenth Amendment, U.S. Const. amend. XVIII, in 1919, regulation of alcohol shifted away from the states, as the federal government took the lead in enforcing Prohibition. But giving the federal government this responsibility proved to be a complete failure, as graft, corruption and bootlegging spread. *See* Edward Behr, *Prohibition: Thirteen Years that Changed America* 83-89, 161-73 (1996).

The failure of federal control prompted the repeal of Prohibition and restoration of state control over traffic in alcohol, through the passage of the Twenty-First Amendment in 1933. Section One of the Amendment expressly repealed Prohibition. Section Two prohibited the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors in violation of the laws thereof." U.S. Const. amend. XXI, § 2.

Congress's decision to model Section Two closely on the Webb-Kenyon Act demonstrates its intent to incorporate and constitutionalize the authority that Webb-Kenyon had conferred upon the states. As Senator Blaine, House manager

of the Joint Resolution proposing the Amendment, observed, because of the Court's "divided opinion" upholding Webb-Kenyon, "it is proposed to write permanently into the Constitution a prohibition along that line." 76 Cong. Rec. 4141 (1933); *see also id.* at 4170 (statement of Sen. Borah) (Webb-Kenyon alone was insufficient to protect state regulation of alcohol because "[t]he Webb-Kenyon Act was sustained . . . by a divided court," and "[t]he President . . . vetoed it on the ground that it was unconstitutional"). By permanently removing the dormant Commerce Clause limitations that had interfered with state regulation of alcohol importation in the past, Congress could protect state power from future erosion by a subsequent Congress or the Courts. *See Craig*, 429 U.S. at 205-06 ("The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes.") (footnote omitted).

Legislative debates over the original version of the Amendment confirm this intent. As introduced in the Senate, the Amendment included a third section that gave Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138. This provision, however, was rejected out of a concern that it would undermine the broad regulatory authority given to the states in Section Two. As Senator Blaine explained:

> The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States. . . . My view therefore is that section 3

> is inconsistent with section 2 and . . . ought to be taken out of the resolution.

Id. at 4143; *see also id.* at 4144 (remarks of Sen. Wagner) ("[Section Three] does not correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems."); *id.* at 4177 (statement of then-Sen. Hugo Black) (Section Three "would take away from the State the right . . . to regulate or prohibit the sale of liquor . . . by giving that power to Congress.").

Following ratification of the Twenty-First Amendment, therefore, it was clear that the importation, distribution and sale of alcoholic beverages would be subject to strict local control and regulation.[6] The states' interest in temperance extended not only to the decision whether to be "dry" or "wet," but in those states that permitted its usage, also included the close regulation of where, when, and what type of alcohol was consumed. *See After Repeal* 60-70.

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6. The records of the state ratification conventions do not reveal any meaningful deliberation as to the scope of the Twenty-First Amendment. *See generally* Everett Somerville Brown, *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws* (1938). Nonetheless, immediately after its passage, the states began to regulate alcohol sale and distribution, including in 26 states by establishing licensing systems. *See After Repeal* 231-248. Many states adopted in-state presence requirements more onerous than that imposed by New York. *See* Bertram M. Bernard, *Liquor Laws of the Forty-Eight States and District of Columbia* 25-26 (1949) (residency in state, and even in county and town, often required for retail license); Joint Comm. of the States to Study Alcoholic Beverage Laws, *Trade Barriers Affecting Interstate Commerce in Alcoholic Beverages* 26-33 (1952) (describing residency requirements in various jurisdictions).

For states that did not establish a monopoly over alcohol distribution, a licensing scheme became the centerpiece of state regulatory efforts.

The states' interest in ensuring an orderly market for alcohol sales was perhaps their most pressing concern immediately after repeal, since Prohibition had been marked by bootlegging and graft. *See Prohibition: Thirteen Years* 83-89, 161-73. Through comprehensive licensing requirements, states could promote order not only by determining who could legally sell alcohol, but also by controlling market forces that might otherwise lead to corruption and disorder. *See After Repeal* 96; *supra* at 1-2. Similarly, since "[t]he repeal of prohibition was brought about as much by the need for revenue as by the desire to eradicate the evils that grew out of that social experiment," *id.* at 173, the licensing schemes ensured that this interest was protected by facilitating tax collection. Those same concerns underlie the New York licensing restrictions at issue here.

C. This Court's Decisions Make Clear that the Twenty-First Amendment Permits States to Enact Any Reasonable Regulation Governing the Transportation and Importation of Alcohol

This Court has repeatedly affirmed that the authority conferred upon the states by the Twenty-First Amendment is virtually unfettered by the dormant Commerce Clause. In cases immediately following ratification of the Amendment, the Court held that the dormant Commerce Clause no longer restricted the right of states to ban or regulate importation of alcoholic beverages. None of these decisions has been overruled, and the legal principle they articulate requires the rejection of petitioners' challenge to New York's importation scheme.

While the Court has subsequently determined that the Twenty-First Amendment does not authorize states to violate other provisions of the Constitution or regulate alcohol trade outside their borders, neither of these concerns is presented by this case. Petitioners contend that New York's restrictions on direct shipment are nonetheless unconstitutional under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). But extending *Bacchus* to invalidate New York's licensing requirement would require the Court to reverse course and treat alcohol as if it were any other product in commerce – thereby jettisoning the constitutional grant of authority conferred upon the states by Twenty-First Amendment. That outcome cannot be squared with any of this Court's other Twenty-First Amendment precedents.

1. This Court's early Twenty-First Amendment decisions confirmed the breadth of state authority to regulate alcohol and explained why the Amendment permitted states to treat imported alcohol differently from alcohol manufactured, distributed, and sold within the state's borders. Three years after ratification, in *Young's Market*, this Court upheld a California statute that imposed a license fee on beer importers, but not on wholesalers who sold domestic beer. 299 U.S. at 61. In rejecting an argument that the law was impermissibly discriminatory, the Court squarely held that states could regulate imported alcohol more stringently than domestic alcohol:

> The plaintiffs ask us to limit [the Twenty-First Amendment's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it

> permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

Id. at 62.

The following year, the Court again upheld a state statute that "clearly discriminate[d] in favor of liquor processed within the State." *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938). At issue was a Minnesota statute that prohibited importation of alcoholic beverages containing greater than twenty-five percent alcohol, but permitted their sale if produced in state. *Id.* at 402. *Young's Market*, the Court observed, had settled that "discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic" by the states. *Id.* at 403.

One year later, the Court sustained a Michigan statute that discriminated against out-of-state alcohol by prohibiting Michigan vendors from selling out-of-state beer. *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939). The Court reiterated that "[s]ince the Twenty-First Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Id.* at 394. That same year, in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939), the Court also upheld Kentucky's restriction on the export of whiskey produced in the state for delivery and consumption out-of-state. Again, it reaffirmed that "[t]he Twenty-First Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Id.* at 138 (internal citations omitted).

These decisions remain good law. Largely ignoring them, petitioners instead rely on traditional Commerce Clause jurisprudence, implying that the Twenty-First Amendment has somehow been so diminished that states now have no more leeway to regulate alcohol importation than they would have to restrict interstate commerce in any other product. But the purpose of the Twenty-First Amendment was to give trade in alcohol a constitutionally unique status. As this Court has observed, the Amendment "primarily created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206.

2. To the extent petitioners acknowledge this Court's Twenty-First Amendment precedent, they rely on decisions indicating that states may not breach other constitutional provisions in the name of regulating alcohol importation. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Free Speech Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig*, 429 U.S. 190 (Equal Protection Clause); *Dep't of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964) (Export/Import Clause). These decisions, however, are not contrary to, but affirm the principle first articulated in *Young's Market*: "The States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause.'" *44 Liquormart*, 517 U.S. at 514-15 (quoting *Ziffrin*, 308 U.S. at 138); *see also Grendel's Den*, 459 U.S. at 121-22; *Craig*, 429 U.S. at 205-06; *James Beam*, 377 U.S. at 344.

Petitioners also point to this Court's decisions holding that Congress may preempt state regulation of alcoholic beverages by exercising its own affirmative Commerce Clause power. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (invalidating

California wine-pricing program because it conflicted with the Sherman Antitrust Act); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (invalidating Oklahoma regulation of alcohol advertising by cable operators as preempted by FCC regulations); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating New York statute restricting sales of alcohol intended solely for use abroad because sales were permissible under federal law). But again, the Court's opinion in each of these cases affirms the principle that lies at the core of this case: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S. at 110; *see also Capital Cities*, 467 U.S. at 712; *Hostetter*, 377 U.S. at 330. And this case, unlike the preemption cases relied upon by petitioners, presents no conflict with federal law. Quite the opposite: Congress specifically sanctioned the states' regulation of alcohol importation when it passed the Webb-Kenyon Act.

Nor do this Court's decisions invalidating state laws that reach extraterritorial commerce help petitioners. In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy v. The Beer Institute*, 491 U.S. 324 (1989), the Court acknowledged that states have broad authority to regulate alcohol importation within their borders, but not to enact price control statutes that "directly control[led] commerce occurring wholly outside the boundaries of [the] State." *Healy*, 491 U.S. at 336; *see also Brown-Forman*, 476 U.S. at 582-84. The Court emphasized that this restriction on state authority served to protect the ability of other states to regulate pursuant to the Twenty-First Amendment. *See Brown-Forman*, 476 U.S. at 585. Petitioners do not contend that New York seeks to control

commerce wholly outside its boundaries, and thus cannot argue that New York's direct shipment provisions are constitutionally suspect under *Brown-Forman* or *Healy*.

3. Petitioners rely most heavily, and again in error, on *Bacchus*. In *Bacchus*, the Court invalidated Hawaii's alcohol excise tax, from which certain locally-produced liquors were exempt. The state offered no justification for the exemption other than "to promote a local industry," and in the lower courts the state expressly eschewed any reliance on interests arising from the Twenty-First Amendment to justify the regulation. *Id.* at 274 n.12.

Bacchus is an anomaly in this Court's Twenty-First Amendment jurisprudence. For the reasons identified by the dissenters, the majority's analysis is difficult to square with the Amendment's plain language. *See Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting).

But the Court need not reach the question of whether *Bacchus* was decided correctly, since it is plainly distinguishable from this case on at least two grounds. First, the purpose of the *Bacchus* tax exemption was concededly "mere economic protectionism"; Hawaii "[did] not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment." *Id.* at 276. The challenged New York regulations, by contrast, were intended to, and in fact do, further New York's legitimate interest in ensuring the integrity of its regulatory scheme, which is itself designed to promote temperance, orderly market conditions, and effective tax collection. Second, because the tax at issue in *Bacchus* was collected at the point of sale, its nexus with the

"importation and transportation" of alcohol was less evident than that of New York's direct shipment regulations.[7]

4. Nor does *Bacchus* or any of this Court's other cases suggest that strict scrutiny applies to state regulation of alcohol importation. To the contrary, in *North Dakota v. United States*, 495 U.S. 423 (1990), decided several years after *Bacchus*, the Court cautioned that "[g]iven the special protection afforded to state liquor control policies by the Twenty-First Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *Id.* at 433. If the Twenty-First Amendment permits any substantive review of state liquor regulation, it is only to inquire whether such laws are reasonably related to the state interests protected by the Amendment. Through the Twenty-First Amendment and its statutory predecessor, the Webb-Kenyon Act, Congress conferred upon the states the full scope of authority over alcohol importation that Congress itself enjoys over other products in interstate commerce. Subjecting state regulations in this area to more stringent review than is applicable to other federal economic legislation would dilute that power. It would also undermine the purpose of constitutionalizing state control of alcohol importation in the first place – to prevent courts from second-guessing state decisions about how to channel the flow of alcohol across and within their borders. *See supra* at 17-22.

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7. As the Second Circuit held, *Bacchus* does not mandate a "two-part" analysis for analyzing the interplay of the Commerce Clause and the Twenty-First Amendment. *See* Pet. App. 22a n.10. In any event, it is of no real consequence whether this Court begins with an examination of the statute under the dormant Commerce Clause or under the Twenty-First Amendment, since New York's regulations are clearly within the scope of authority that the Amendment confers upon the States.

The proper standard of review, therefore, is exceedingly deferential. "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981). "[I]f there is any reasonably conceivable state of facts that could provide a rational basis for the classification," economic legislation must be upheld. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *see also id.* at 314-15 (motives of legislators in drawing legislative classifications "entirely irrelevant for constitutional purposes"); *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").

POINT II

NEW YORK'S DIRECT SHIPMENT RESTRICTIONS ARE ESSENTIAL TO THE STATE'S EFFECTIVE ENFORCEMENT OF ITS LAWS GOVERNING ALCOHOL DISTRIBUTION AND USE AND THEREFORE ARE AUTHORIZED BY THE TWENTY-FIRST AMENDMENT

Petitioners challenge ABC Law sections 102(1)(c) and (d), which permit the shipment of alcoholic beverages into New York State only to a state-licensed entity. Also relevant to petitioners' challenge is ABC Law section 3(37), which requires that all wineries, including those located out-of-state, maintain an in-state presence in order to obtain a New York license.

These requirements directly advance the core concerns that animate Section Two of the Twenty-First Amendment: "promoting temperance and controlling the distribution of liquor, in addition to raising revenue." *North Dakota*, 496 U.S. at 436; *see also Ziffrin*, 308 U.S. at 134 (upholding restrictions that furthered purposes of "channeliz[ing] the traffic [in alcohol], minimiz[ing] the commonly attendant evils," and "facilitat[ing] the collection of revenue"). Unlike the protectionist measure invalidated in *Bacchus*, New York's regulations are reasonably related to a legitimate state end and are therefore entirely constitutional.

A. Restricting Direct Shipment to Licensed Entities With an In-State Presence Permits New York to Supervise Traffic in Alcohol and Enforce Its Liquor Laws

1. The overall purpose of New York's scheme for regulating alcohol importation and transportation is to "foste[r] and promot[e] temperance in [alcohol] consumption and respect for and obedience to law," as well as to promote "the protection, health, welfare and safety of the people of the state." ABC § 2. In furtherance of these goals, the ABC Law prohibits sales to minors and visibly intoxicated persons; it also structures the marketplace to favor sale of beer and wine over liquor, to prohibit aggressive or unsafe sales practices, and to restrict most sales for off-premises consumption to stores that engage in no other additional business. *See supra* at 2-3. The ABC Law also prohibits tied-house arrangements, requires non-discrimination among commercial purchasers, and authorizes the SLA to restrict the number of licenses. *Id.* Additionally, New York imposes an excise tax on all alcohol sold within its borders, which it collects at the wholesale level, as well as a sales tax. *Id.*

2. Like many other states, *see* Ohio Br. at 13, New York has concluded that direct shipment of alcoholic beverages into the State by unlicensed entities would significantly impede enforcement of its laws by creating an unregulated channel for the sale of alcohol. Accordingly, it requires that all alcohol sold for consumption within the State pass through the hands of least one licensed entity with an in-state presence. This rule is not only reasonable, but essential, for several reasons.

First, New York has reasonably concluded that it can efficiently monitor licensees only if they have an in-state presence. The ABC Law requires that licensees keep on the premises "books and records of all transactions involving the manufacture and sale" of alcoholic beverages. ABC § 103(7). It also authorizes the on-site inspection of any premises where alcoholic beverages are manufactured or sold. ABC § 18(4). This access to licensees' records and premises obviously makes it easier for the SLA to identify unlawful activities.The oversight enabled by these record-keeping and access rules is especially important for the prevention of sales to minors through direct shipment, which by its nature eliminates a face-to-face sale and thereby increases the risk that minors will be able to obtain alcohol through internet sales or otherwise.[8] *See* Aff. of Henry Wechsler ¶¶ 24-26 (J.A. 136-38); Decl. of Fredrick P. Schaffer ¶¶ 4-11, 17-52 (J.A. 164-67, 169-84); *see also* Brief Amicus Curiae of Michigan Ass'n of Secondary School Principals *et al.* at 10-22 (Nos. 03-1116, 03-1120); Ohio Br. at 23-24.

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8. The impact of an adverse ruling in this case would not be limited to fine wines, but would extend to other alcoholic beverages often consumed by minors, such as wine coolers and flavored vodkas.

While New York need not have explored other regulatory options for the scheme it has adopted to pass constitutional scrutiny, petitioners' suggested alternatives are in any event impractical. Petitioners propose adoption of a permit system that does not require an in-state presence. *See* Pet. Br. at 40 & n.28. Under that regime, New York would presumably send its inspectors nationwide to enforce its laws. That prospect would be prohibitively expensive as well as logistically impracticable, not in the least because the State relies on local law enforcement agencies to assist in monitoring and enforcing compliance with the ABC Law. *See supra* at 4. As for relegating enforcement to other states, New York has no control over their enforcement priorities and thus cannot ensure a prompt response to alleged unlawful activity. Additionally, the State has determined that effective control of the alcohol industry requires more than *post hoc* enforcement of those violations that happen to come to light.

Second, New York has reasonably concluded that requiring businesses that traffic in alcohol to hold a license and maintain an in-state presence is a powerful deterrent to unlawful activities. License revocation exacts a substantial cost from its holder – an advantage recognized when the ABC Law was first enacted in 1934. *See Text of Mulrooney's Review of Year of Liquor*, N.Y. Times, Dec. 5, 1934, at 15 (revocation was "most effective" enforcement weapon); *1935 Rep. of the State Liquor Authority* 8 (power of revocation "most effective, and almost the only, check upon [unlawful sales]"), *quoted in After Repeal* 216. As a major 1933 study of state liquor control observed, the threat of revocation is more effective as an enforcement tool when linked to a physical presence. *See* Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 49 (1933) (revocation of premises license more effective than revocation of

individual license). Without the requirement of an in-state presence, an out-of-state winery that violates the ABC Law risks losing only the right to ship to its New York customers; a winery with an in-state presence risks having its New York location rendered inoperative as well.

Third, New York has reasonably concluded that an in-state presence ensures effective collection of its excise and sales taxes. A state's authority to require out-of-state vendors with no in-state physical presence to pay the state's excise, sales, or use taxes is subject to considerable uncertainty. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Even with that authority, however, procedural hurdles such as personal jurisdiction and forum selection may complicate the collection of taxes from out-of-state businesses.[9] Nor can New York rely on self-reporting by out-of-state vendors. Widespread vendor noncompliance with federal reporting requirements for interstate cigarette sales demonstrates the need for direct oversight and enforcement powers in the case of alcohol. *See Internet Cigarette Sales: Limited Compliance and Enforcement of the Jenkins Act Results in Loss of State Revenue: Testimony Before House Comm. on the Judiciary*, 108th Cong., 1st Sess. (2003) (testimony of Paul L. Jones, Director of Homeland Security and Justice), *available*

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9. The Twenty-First Amendment Enforcement Act, 27 U.S.C. § 122a (2004), does not resolve these difficulties. It provides a federal forum for state attorneys general seeking to enjoin unlicensed vendors from violating state alcohol regulations. 27 U.S.C. § 122a(c)(1). Because it confines a state's remedy to injunctive relief, 27 U.S.C. § 122a(c)(3), it is unclear whether the law would permit the collection of taxes owed for unlicensed out-of-state sales. Nor does the Act necessarily address problems in obtaining personal jurisdiction over violators, particularly where internet sales are involved.

at http://www.gao.gov/new.items/d03714t.pdf; *see also* Aff. of Walter Hellerstein ¶ 18 (J.A. 68) (describing practical difficulties in collecting use taxes from individual purchasers).

B. New York's Direct Shipment Restrictions Are Not Impermissibly Protectionist or Discriminatory

Unable to refute this close nexus between the core purposes of the Twenty-First Amendment and New York's licensing requirement, petitioners claim that ABC Law sections 102(1)(c) and (d) are unconstitutional on the grounds that they were motivated by protectionist concerns and that they impermissibly discriminate against out-of-state wineries. *See* Pet. Br. at 11-13, 18-21, 24-27, 29. Neither argument is persuasive.

1. Sections 102(1)(c) and (d) bear no resemblance to the protectionist tax exemption invalidated in *Bacchus*. These provisions of the ABC Law directly regulate how alcohol may be imported into New York State, as opposed to imposing differential excise taxes on wholesale sales. *See* 468 U.S. at 265. And while Hawaii itself acknowledged that the sole purpose of its tax was to promote local industry, *id.* at 276, New York's laws were intended to advance purposes that are clearly legitimate under the Twenty-First Amendment, and as a practical matter, achieve this goal.

While very little legislative history survives from the 1934 enactment of the ABC Law, it is likely that sections 102(1)(c) and (d) were based on New York's experience with the use of direct shipment to evade regulatory oversight. In describing the history of New York's ban on direct

importation to non-licensees, the SLA's first Annual Report recounts that:

> At first, through permits of the Customs Department, individuals were permitted to import liquor from other countries. Investigation of the permits showed that some individuals were abusing this privilege and were importing hundreds of cases which were not for their personal use. This misuse of the privilege resulted in the cancellation of individual permits . . . to limit importations into the State of New York to people holding New York State liquor licenses.

1933-34 Rep. of the State Liquor Authority 10.[10] As for Section 3(37), its in-state presence requirement apparently was intended to extend the deterrent effects of license revocation beyond the person and to the premises where liquor was sold. *See supra* at 4.

With respect to the 1970 revisions of the ABC law, those amendments were intended to close a loophole that had briefly permitted out-of-state retailers to ship directly to New York consumers, and thereby avoid New York State taxes, license fees, and other regulations. *See House of York, Ltd. v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970); *see also*

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10. Early federal support existed for state restrictions of imports to license holders. *See* Fed. Alcohol Control Admin., *Code of Fair Competition for the Wine Industry*, art. V, § 10(a), at 7 (Dec. 1, 1934) (prohibiting wineries from selling wine to non-licensees, "if such a license is required of such person by State law," upon proper notice); Fed. Alcohol Control Admin., *Code of Fair Competition for the Alcoholic Beverages Importing Industry*, art V, § 7(a), at 4 (Aug. 1, 1934) (same for alcoholic beverage importers).

Mem. of State Exec. Dep't and State Dep't of Tax. and Fin., ch. 242, *reprinted in* 1970 McKinney's N.Y. Laws 2868, 2869 (describing express purpose of 1970 revisions as "control[ing] the importation of alcoholic beverages into the State" and "eliminat[ing] an unfair tax advantage to foreign and other out-of-state mail-order firms selling alcoholic beverages to New York residents"). Regulations like Section 3(37), which ensure that out-of-state suppliers comply with the rules governing importation of alcohol, are plainly permissible under the Twenty-First Amendment. *See, e.g., North Dakota*, 495 U.S. at 432-33; *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 283-84 (1972); *Duckworth v. Arkansas*, 314 U.S. 390, 396 (1941).[11]

Nor does New York's in-state presence requirement discriminate against out-of-state businesses in violation of

11. Petitioners note that the 1970 amendment permitted persons to ship wine to themselves for personal use if they were out of the country for more than 48 hours, but not if they were in another state. *See* Pet. Br. at 3 & n.4. Any such distinction is irrelevant to this case, which concerns only the ability of wineries to ship to New York consumers, not the ability of New York consumers to ship to themselves from other states. Indeed, petitioner Cortes DeRussy admits that he has shipped wine to himself from California. Aff. of Cortes DeRussy ¶ 3 (2d. Cir. J.A. 100). In any event, the language appears to be an artifact of the 1970 Legislature's focus on foreign imports rather than imports from other states. *See* Mem. of State Exec. Dep't and State Dep't of Tax. and Fin., ch. 242, *reprinted in* 1970 McKinney's N.Y. Laws 2868. The New York Court of Appeals has interpreted the ABC law to permit a New York resident to personally transport alcohol into the State for personal use. *See People v. Ryan*, 274 N.Y. 149, 153-54, 8 N.E.2d 313, 315-16 (1937) (New York resident's transportation into the State of alcohol that he had purchased in Connecticut did not violate ABC law). The SLA has understood *Ryan* as authorizing a New York resident, while traveling in another state, to ship wine home for personal use.

the dormant Commerce Clause. First, the requirements for making direct shipments of wine to consumers are facially neutral. Contrary to petitioners' claims, *see* Pet. Br. at 5, 20, out-of-state wineries can obtain a New York winery license, which would enable them to ship directly to New York consumers. To do so they need only establish an in-state presence by maintaining "a branch factory, office or storeroom" in New York State and receiving shipments of wine "consigned to a United States government bonded winery, warehouse or storeroom located within the state." ABC § 3(37).

Even if this requirement imposes some costs on out-of-state wineries, this Court has repeatedly upheld statutes imposing just such burdens. In *Young's Market*, the Court held that a state law that imposed a separate license fee on firms that sold imported beer which was not imposed on wholesalers selling only domestically-produced beer, was within the powers accorded by the Amendment and did not violate the Commerce Clause. 299 U.S. at 62-63. In *Heublein*, the Court held that a state law requiring that out-of-state liquor manufacturers have a resident in-state representative comported with the dormant Commerce Clause, finding the requirement "reasonably related" to the state's purpose of reviewing the manufacturers' records and enforcing pricing restrictions. 409 U.S. at 282-83. Even more recently, the Court upheld a North Dakota statute that imposed labeling and reporting requirements on out-of-state businesses that shipped alcohol to military bases within the state, but not on in-state suppliers that sold to those same federal enclaves. *North Dakota*, 495 U.S. at 444. Because the requirements enabled the state "to record the volume of liquor shipped into the State and to identify those products which have not been distributed through the State's liquor distribution

system," they "unquestionably serve[d] valid state interests." *Id.* at 433.

New York's mandate that alcoholic beverages originating out-of-state pass through at least one licensed in-state entity serves the same interests, and is likewise constitutional. While this requirement might be considered impermissibly discriminatory if imposed on other products, differential burdens created by regulation of alcohol do not raise the same constitutional concerns. The Twenty-First Amendment shields state regulation of alcohol from dormant Commerce Clause challenges so that states may channel the flow of alcohol across and within their borders. To do so, states must be able to bring alcohol imported from out-of-state within their licensing scheme – an objective that squarely implicates the reasons for the Amendment's enactment. Indeed, under the precedents of this Court, New York could bar direct shipment from out-of-state wineries altogether.

2. Finally, petitioners claim that sections 102(1)(c) and (d) are impermissibly discriminatory because, in their view, in-state entities enjoy various exemptions to the rule that all alcohol must pass through the three-tier system. *See* Pet. Br. at 4, 27-28. In the first place, that assumption is incorrect; all alcoholic beverages distributed and sold in the State must pass through the hands of a licensed entity.

Nor do the provisions they cite confer any special direct shipment privileges on in-state wineries. For example, while farm winery licensees may ship directly to consumers, *see* ABC § 76-a(3),[12] all other wineries may do so as well,

12. Petitioners mistakenly state that such shipments are authorized by ABC Law § 76-a(6)(b) and (d). *See* Pet. Br. at 3-4, 28. (Cont'd)

including petitioners Swedenburg and Lucas Wineries, as long as they obtain a winery license and a certificate to ship, *see* ABC §§ 76, 77(2). As for sections 76(4) and 105(9), these provisions permit a winery to obtain a license to sell and deliver New York wine at retail for off-premises consumption, thereby enabling the winery to open a separate retail establishment in New York to market its wines. *See* Mem. of the State Exec. Dep't, ch. 600, *reprinted in* 1977 McKinney's N.Y. Laws 2381. But a winery does not need such a license to ship directly to New York consumers. Other provisions mentioned by petitioners – including authority to conduct tastings of New York wines, ABC § 76(2)(a), sell them at dinner theaters and state fairs, ABC §§ 76(4), 77(5), and contract with other wineries for FTD-type "wine by wire" sales, ABC § 76(5)– do not even concern direct shipment.

In any event, the few stray references to the promotion of New York's wine industry in the legislative history of the provisions referenced by petitioners cannot render the State's licensing scheme unconstitutional, since the challenged regulations rationally further its legitimate regulatory objectives under the Twenty-first Amendment. *See, e.g.*, *Beach*, 508 U.S. at 314-15 (legislators' motives irrelevant if any rational basis for classification exists).[13]

(Cont'd)

Section 76-a(6)(b) has nothing to do with shipment and section 76-a(6)(d) was enacted to permit farm wineries to ship to one another and engage in cooperative sales. *See* Mem. of William L. Parment, ch. 490, *reprinted in* 1993 N.Y.S. Leg. Ann. 354-56.

13. This Court declined to grant certiorari on petitioners' Privileges and Immunities Clause claim and should decline to review it now. In any event, as the Second Circuit held, New York's statutory scheme does not violate that clause. Pet. App. at 29a-30a.

POINT III

NEW YORK'S DIRECT SHIPMENT RESTRICTIONS COMPORT WITH THE DORMANT COMMERCE CLAUSE

1. Even if this Court concludes that, contrary to the authority granted by the Twenty-First Amendment, the dormant Commerce Clause still meaningfully constrains New York's authority to regulate alcohol importation, the challenged provisions still pass constitutional muster. In reviewing the State's direct shipment restrictions, a very deferential standard should apply to account for the unique constitutional protection accorded state regulation of alcoholic beverages – one that is at least as deferential as that set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1969).

Under the *Pike* balancing test, an even-handed statute that imposes an incidental burden on out-of-state businesses is constitutional if it serves a "legitimate local public interest" and the burden it imposes is not "clearly excessive in relation to the putative local benefits." *Id.* at 142. New York's requirements for obtaining a winery license, which in turn allows an entity to procure a permit to make direct shipments, satisfy this standard. First, they apply equally to in-state and out-of-state businesses. The requirements also directly further the State's legitimate interests in protecting the integrity of its alcohol distribution system and ensuring that licensees are within the reach of the State's enforcement and taxing agencies. Any burden on out-of-state businesses is incidental and not clearly excessive in relation to these local benefits, and the requirements are therefore constitutional. *Compare Carter v. Virginia*, 321 U.S. 131 (1944) (state routing,

bonding and records requirements for transporting alcohol through the state within the state's power, independently of the Twenty-First Amendment, and not in contravention of the dormant Commerce Clause); *Duckworth*, 314 U.S. 390 (upholding against Commerce Clause challenge, without considering the Twenty-First Amendment, state conviction for transporting alcohol through the state without a permit).

Indeed, New York's licensing and in-state presence requirements would survive even strict scrutiny. The State's interest in effective enforcement of the ABC Law constitutes a legitimate, non-protectionist reason for requiring an in-state presence. *Compare Maine v. Taylor*, 477 U.S. 131, 151-52 (1985). Any equally effective alternative – for example, sending New York officials to other states to inspect facilities, employment records, or sales receipts – would be so expensive and burdensome that it is for practical purposes unavailable. And while some states may use a permitting system, that approach provides neither the oversight nor the deterrence of New York's licensing scheme.

2. Should this Court find that New York's in-state presence requirement violates the dormant Commerce Clause, the appropriate remedy would be to strike only that portion of the ABC Law which permits licensed in-state wineries to sell and ship wine directly to consumers. A severability clause is included both in the ABC Law as a whole and the Session Law enacting the farm winery exemption. *See* ABC § 161; Act of July 26, 1993, ch. 490, § 24, *reprinted in* ABC § 76-a, 3 McKinney's Cons. Laws of N.Y. at 182 (2000); *see also* ABC § 160 (ABC Law "shall be so construed as to assure that the policy of the state and the intent and purpose thereof will be carried out"). Under New York law, an entire statute should not be invalidated "when

only portions of it are objectionable." *Nat'l Adver. Co. v. Niagara*, 942 F.2d 145, 148 (2d Cir. 1991). Were the court to invalidate sections 102(c) and (d), which restrict shipment of all alcoholic beverages to licensed entities, instead of those provisions which allow licensed wineries to ship directly to consumers, any unlicensed out-of-state entity would be permitted to make direct shipments of any type of alcohol into New York free from any oversight or supervision. That result would eviscerate the core of the State's enforcement regime.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

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IN THE

Supreme Court of the United States

JUANITA SWEDENBURG, *ET AL.*,

Petitioners,

v.

EDWARD D. KELLY, *ET AL.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellees below, are Juanita Swedenburg, in her own capacity, Juanita Swedenburg, as proprietor of Swedenburg Winery, a Virginia partnership, David Lucas, in his own capacity, David Lucas, as proprietor of The Lucas Winery, a California sole proprietorship, Patrick G. Fitzgerald, Cortes DeRussy, and Robin Brooks.

State respondents, defendants-appellants below, are Edward F. Kelly, Chairman of the New York State Liquor Authority, Division of Alcoholic Beverage Control, in his official capacity, and Lawrence J. Gedda and Joseph Zarriello, Commissioners of the New York State Liquor Authority, Division of Alcoholic Beverage Control, in their official capacities.

Private respondents, intervenor-defendants-appellants below, are Charmer Industries, Inc., Peerless Importers Inc., Premier Beverage Company LLC, and Eber Brothers Wine and Liquor Corp., each a New York-licensed alcoholic beverage wholesaler, Local 2D of the Allied Food and Commercial Workers International Union, a union comprised of commissioned alcoholic beverage salespeople in the New York-metropolitan area, and Metropolitan Package Store Association, Inc., a trade association of New York-licensed alcoholic beverage retailers.

RULE 29.6 STATEMENT

There are no amendments required to the corporate disclosure statement appearing in private respondents' brief on petition for a writ of certiorari.

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BRIEF FOR PRIVATE RESPONDENTS

STATEMENT OF THE CASE

Since the repeal of Prohibition, New York has restricted the importation and distribution of liquor to entities licensed and closely regulated by the State. On summary judgment, the district court held that this regulatory scheme violates the "dormant" Commerce Clause by "discriminating" against out-of-state liquor sellers who wish to sell wine to New York consumers without complying with New York's licensing requirements. The court of appeals reversed, concluding that § 2 of the Twenty-first Amendment—which prohibits the importation of liquor "into any State . . . in violation of the laws thereof"—had "constitutionalized" New York's regulatory scheme so as to protect it from dormant Commerce Clause challenge.

1. Before Prohibition, many States enacted licensing and other laws to restrict or prohibit the importation and sale of alcoholic beverages. Although the Court initially sustained the constitutionality of such laws (*see The License Cases*, 46 U.S. (5 How.) 504 (1847)), in the latter part of the nineteenth century they increasingly ran afoul of what is now known as the "dormant" Commerce Clause. In *Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888), for example, the Court struck down a state statute that prohibited common carriers from importing alcohol into the State without a permit. Two years later, in *Leisy* v. *Hardin*, 135 U.S. 100 (1890), the Court held that a state regulation prohibiting the sale of imported alcohol likewise ran afoul of the dormant Commerce Clause. The Court reasoned that as long as the liquor was sold in its original packages, it remained an article of interstate commerce and, as such, was beyond state regulation absent congressional authorization. *Id.* at 124-25.

At the States' urging, Congress responded to *Leisy* by enacting the Wilson Act. Entitled "[a]n Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases," the Wilson Act authorized the States to regulate imported alcohol "upon arrival in such state . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State," regardless of whether such alcohol was in its "original packages." Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121). A year later, the Court upheld the Wilson Act in *In re Rahrer*, 140 U.S. 545 (1891), holding that Congress, through the exercise of its commerce power, was free to "divest[]" articles of commerce of their "interstate" "character." *Id.* at 562.

Before long, however, this Court narrowly construed the Wilson Act in a manner that impeded the States' ability to control the influx of liquor. In *Scott* v. *Donald*, 165 U.S. 58 (1897), the Court held that, despite the Wilson Act, a State lacked the power to "recognize[] the manufacture, sale and use of intoxicating liquors as lawful" for domestic consumption while "discriminat[ing] against the bringing of such articles in, and importing them from other States." *Id.* at 101. Congress had not meant to legitimize state legislation of that type, the Court believed, and—because such legislation therefore remained subject to Commerce Clause scrutiny—it was "void as a hindrance to interstate commerce." *Ibid.* Then, in the companion cases of *Rhodes* v. *Iowa*, 170 U.S. 412 (1898), and *Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438 (1898), the Court held, respectively, that alcohol did not "arrive" in a State for purposes of the Wilson Act until it reached its final destination therein (as opposed to the moment it crossed that State's border), and that the Act therefore could not save state laws that purported to prohibit individuals from ordering alcohol (such as through mail order) for personal consumption from out-of-state vendors.

Congress again responded, this time to close the loopholes created by decisions such as *Scott*, *Rhodes* and *Vance*.

The measure was the Webb-Kenyon Act. Act of Mar. 1, 1913, ch. 90, § 1, 37 Stat. 699 (codified at 27 U.S.C. § 122). Entitled "[a]n act divesting intoxicating liquors of their interstate character in certain cases," the Webb-Kenyon Act provides, in unambiguous terms, that the "shipment or transportation . . . of any . . . intoxicating liquor . . . from one State . . . into any other State . . . in violation of any law of such State . . . is prohibited." *Id.*

This Court sustained the constitutionality of the Webb-Kenyon Act against a non-delegation challenge in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311 (1917). In that case, the Court also rejected the argument that the new Act should be narrowly construed so as to continue to subject discriminatory state laws to Commerce Clause scrutiny. *Id.* at 322. "The antecedents of the Webb-Kenyon Act," said the Court, "leave no room for the contention made." *Id.* at 323. In particular, the Court adverted to the Wilson Act and to this Court's cases holding that the "receipt and the possession . . . and the resulting right to use" imported liquor "remained protected by the commerce clause." *Ibid.* (citing *Vance*, *supra*). "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it," the Court concluded, "there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws . . . . [I]f that be not true, the coming into being of the act is wholly inexplicable." *Id.* at 323-24.

The Court accordingly construed the Webb-Kenyon Act as "t[aking] the protection of interstate commerce away from *all* receipt and possession of liquor prohibited by state law." *Id.* at 325 (emphasis added). That construction of the Webb-Kenyon Act also disposed of any conceivable Commerce Clause objection to the West Virginia statutes at issue, the

Court held, for "if th[e] act was within the power of Congress to adopt"—as the Court concluded it was—"there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution." *Ibid.*

2. The Eighteenth Amendment mooted any further litigation by creating a national ban on "the manufacture, sale, or transportation of intoxicating liquors." U.S. CONST. amend. XVIII, § 1. With the ratification of the Twenty-first Amendment in 1933, however, the States were once again given the power to regulate the importation and use of intoxicating liquors within their borders—this time by constitutional amendment. In particular, Section 2, patterned after the Webb-Kenyon Act, "prohibited" the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI, § 2.[1]

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[1] Section 2 incorporated the substance of the Webb-Kenyon Act in order to preserve for posterity its grant of authority to the States. *See* 76 CONG. REC. 4,141 (1933) (Sen. Blaine), 4,172 (Sen. Borah) (both recognizing that the effect of Section 2 was to incorporate Webb-Kenyon "permanently into the Constitution"). Senator Borah, the principal proponent of Section 2 when the Twenty-first Amendment was debated in Congress, offered two reasons why Section 2 was warranted in light of Webb-Kenyon. First, he noted that the Webb-Kenyon Act had been sustained in *Clark Distilling* "by a divided court, [and] might very well be held unconstitutional upon a re-presentation of it." 76 CONG. REC. 4,170. The Webb-Kenyon Act had been vetoed by President Taft as an invalid "delegation by Congress to the States of the power regulating interstate commerce" (49 CONG. REC. 4,291 (1913)), and this Court was on the verge of striking down significant components of the New Deal on this ground. *See Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935).

Neither the Webb-Kenyon Act nor the Wilson Act had been repealed during Prohibition. Nonetheless, two years after ratification of the Twenty-first Amendment, Congress reenacted the Webb-Kenyon Act without change as part of a general post-Prohibition overhaul of federal liquor laws. *See* Act of Aug. 27, 1935, ch. 740, tit. II, § 202(b), 49 Stat. 872, 877-78. Congress did not reenact the Wilson Act, which remains on the books solely by virtue of its original passage in 1890. *See* Act of Aug. 8, 1890, ch. 728, 26 Stat. 313.

3. New York, exercising its then-new authority under § 2 of the Twenty-first Amendment, enacted its Alcoholic Beverage Control Law ("ABC Law") in 1934. C.A. App. 3633-89. As did most States, New York adopted a "three-tier" regulatory system for distribution of alcoholic beverages under which out-of-state producers of alcoholic beverages typically sell their products to New York-licensed wholesalers, who then sell them to New York-licensed retailers, who, in turn, sell them to in-state consumers. Thus, under New York's ABC Law, unlicensed purveyors of alcohol cannot legally ship their products directly to consumers located within New York State. The core of this system is ABC Law § 102(1)(c), which provides that no liquor may be shipped into New York unless the consignee is licensed, and § 102(1)(d), which prohibits common carriers and others from delivering liquor to anyone other than a licensed consignee. *See* Pet. App. 81a-82a.

Under New York law, a "licensed winery" is a winery that meets the licensure requirements (such as passing a background check and paying the requisite taxes and fees) and "maintains a branch factory, office or storeroom within the State of New York." J.A. 11-12 (ABC Law § 3(37)). A licensed winery may obtain a retail license allowing it to ship

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Second, Senator Borah was also concerned that a later Congress might repeal Webb-Kenyon. 76 CONG. REC. 4,170.

wine directly to New York consumers. Pet. App. 7a-8a (citing ABC Law §§ 76(4), 77(2)). "Thus, unlike in other states, out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol. They must, however, comply with the licensing requirements of the ABC Law, including establishing and maintaining a physical presence in New York." Pet. App. 8a (footnote omitted).

4. Petitioners, who are out-of-state wine producers and in-state wine consumers, sued the state respondents, who are officials of the agency charged with administering and enforcing New York's ABC Law. Petitioners sought a declaration that the prohibitions on direct shipment codified in ABC Law §§ 102(1)(c) and (d) are unconstitutional under the dormant Commerce Clause because they prohibit out-of-state wineries who elect not to comply with New York's licensing requirements from shipping their wines directly to New York consumers, while other provisions of the ABC Law permit licensed, in-state wineries to make such shipments. Private respondents, who are liquor wholesalers and representatives of liquor retailers, intervened as defendants.

The district court granted summary judgment to petitioners, "conclud[ing] that the New York ban on the direct shipment of out-of-state wine is unconstitutional." Pet. App. 35a. The court first ruled that the New York regime "burdens interstate commerce and is discriminatory (on its face)" because "out-of-state wineries must consign their products to a (three-tier) wholesaler, [but] in-state wineries do not." *Id.* at 53a. The district court then concluded that New York's prohibition on direct shipment by unlicensed liquor sellers does not "implicate the State's core concerns under the Twenty-first Amendment," because the State's concerns "can be addressed (in a nondiscriminatory manner) for out-of-state as well as for in-state wineries." Pet. App. 59a, 61a.

As remedy, the district court enjoined the state respondents from enforcing ABC Law §§ 102(1)(c) and (d) "in [a]

manner that would prohibit (i) the winery plaintiffs from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries and (ii) the consumer plaintiffs from receiving wines shipped directly to them from out-of-state wineries on the same terms and conditions applicable to consumers of New York wineries." Pet. App. 72a.

5. The court of appeals reversed. Pet. App. 1a-33a. After reviewing the "[l]egal [h]istory" of the Twenty-first Amendment, including this Court's decisions in *Bowman*, *Leisy*, and *Rhodes*, as well as Congress's responses to them with the Wilson and Webb-Kenyon Acts, the court observed that the language of "Section 2 effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Id.* at 16a.

The court of appeals also analyzed this Court's cases construing the Twenty-first Amendment, and "disagree[d] with the proposition that [this] Court's Twenty-first Amendment jurisprudence confines the scope of section 2 to state regulations that advance so-called core concerns." Pet. App. 17a. The court found that, with respect to the issue raised here, this Court's Twenty-first Amendment cases have been consistent and unambiguous in reserving to the States broad power over interstate transportation and intrastate distribution of alcohol, whereas the cases on which petitioners relied primarily involved state laws that were at odds with valid assertions of federal authority or with provisions of the Bill of Rights, or state laws that impermissibly attempted to regulate the internal affairs of other States. *Id.* at 18a-19a, 23a-24a. "[I]n each case," the court observed, this "Court unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders it 'primarily created an exception to the normal operation of the Commerce Clause.'" *Id.* at 23a (quoting *Craig* v. *Boren*, 429 U.S. 190, 206 (1976)). In light of that purpose, the court noted, "[a]llowing dormant Commerce Clause concerns to

restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity." *Id.* at 16a.

Applying these principles to New York's regulatory regime, the court held that "New York's . . . regime falls squarely within the ambit of section 2's grant of authority." Pet. App. 25a. The court determined that New York's statutory scheme "regulates only the importation and distribution of alcohol in New York"; that "New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests"; that there was "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests"; that New York's regulatory scheme is not discriminatory because, unlike in other States, "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state"; and that the ABC Law's mandate that all licensees establish a physical presence in the State serves valid regulatory functions such as ensuring that those trafficking in alcohol are accountable to the State. *Id.* at 25a-29a. Accordingly, the court of appeals reversed the district court's grant of summary judgment in favor of petitioners on their dormant Commerce Clause claim.[2]

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[2] The court also rejected petitioners' claim that New York's statute violates the Privileges and Immunities Clause of Article IV. *Id.* at 29a-30a. Although this Court declined petitioners' bid to obtain review of that ruling, petitioners continue to urge the Court to address their Article IV contentions on the basis of briefing submitted by one of their *amici*. Pet. Br. 15 n.12 (citing Br. of Virginia Wineries Association as *Amicus Curiae*). These contentions are not properly before this Court. *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999); *Reno* v. *Koray*, 515 U.S. 50, 55 n.2 (1995); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979).

SUMMARY OF ARGUMENT

I. Section 2 of the Twenty-first Amendment prohibits the importation of liquor into any State for delivery or use therein in violation of that State's laws. The direct shipment of liquor from an unlicensed, out-of-state seller to an unlicensed, in-state buyer violates the laws of New York. Regardless of whether this regulatory scheme would pass muster under the dormant Commerce Clause for commodities other than liquor, the Twenty-first Amendment expressly authorizes the New York statute at issue.

A. This Court's Twenty-first Amendment cases *all* compel the conclusion that New York's three-tier system, including the ban on direct shipment by unlicensed liquor sellers, is constitutional.

1. Soon after the ratification of the Twenty-first Amendment, this Court unanimously rejected precisely the same argument that petitioners advance in this case. *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936). Although the plaintiffs in that case argued, as petitioners do here, that the Commerce Clause requires States to allow imported liquors to compete "on equal terms" with domestic ones, this Court concluded that such a conclusion was not possible absent a "rewriting" of the Twenty-first Amendment. *Young's Market* was followed in a series of cases that upheld against dormant Commerce Clause challenge numerous state laws regulating the importation of liquor, all of which this Court held or assumed were "discriminatory" in the sense used by petitioners here—*i.e.*, they regulated "importation" of liquor under Section 2 by targeting the shipment of liquor from out-of-state sources. These decisions, issued in the immediate wake of the Twenty-first Amendment's ratification, provide an authoritative guide to its meaning.

2. Petitioners all but ignore these cases notwithstanding the fact that the reasoning of those decisions has "remained unquestioned." *Hostetter* v. *Idlewild Bon Voyage Liquor*

Corp., 377 U.S. 324, 330 (1964).. And the more recent decisions on which they rely offer no more support for their position. Most of the cases on which petitioners rely are simply inapposite because they involved state laws that conflicted with valid federal statutes, *e.g.*, *Hostetter*, *supra*, or with provisions of the Constitution other than the dormant Commerce Clause, *Craig* v. *Boren*, 429 U.S. 190 (1976).

The dormant Commerce Clause cases cited by petitioners are no more persuasive. One strand of authority holds that because the Twenty-first Amendment "confers no authority to control sales in other States," state laws with extraterritorial effects may be unconstitutional. *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 585 (1986). But there is no claim of extraterritoriality in this case. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), is similarly inapposite. The Court there struck down a discriminatory tax statute that did not purport to regulate the "transportation or importation" of liquor into the State *at all*, and which concededly had been enacted solely to protect local industry. Thus, the essential predicate for the Court's Commerce Clause analysis in *Bacchus* was that the statute fell outside the ambit of the Twenty-first Amendment. The New York licensing scheme, by contrast, directly regulates the importation of intoxicants and is expressly authorized by the Twenty-first Amendment.

B. The traditional three-tier distribution system is an "unquestionably legitimate" means of "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990). New York's scheme furthers these same regulatory interests.

1. Those who wish to sell liquor in New York are subject to a host of regulatory requirements, but New York reasonably treats all liquor purveyors alike: They must *all* sell through an entity that is licensed by, and fully accountable to, the State. An out-of-state wine producer thus may freely sell

to New York consumers through the three-tier system, or he may obtain his own New York license. To be sure, obtaining a license requires him to shoulder some of the burdens that New York imposes on licensed in-state wine sellers, such as maintaining a physical presence in the State so that state officials can readily monitor his compliance with the regulatory structure. But petitioners never satisfactorily explain why this type of licensing requirement is not at the very core of what the text of the Twenty-first Amendment authorizes. Certainly, the proposition that out-of-state liquor sellers are entitled to create their own unregulated interstate market to compete with licensed in-state sellers would have come as a surprise to those who framed the Twenty-first Amendment.

2. Petitioners' objection that the three-tier system raises prices and reduces consumer choice is irrelevant. The Twenty-first Amendment expressly allows a State to regulate what (if any) kind of liquor is available to its residents, and at what price. This authority is not defeated by petitioners' claim of "protectionism." In any event, as the court of appeals noted, there is no basis in the record for concluding that New York's regulatory scheme is intended to favor local interests over out-of-state interests.

II. Wholly apart from the Twenty-first Amendment, the dormant Commerce Clause is not implicated here because Congress, in the Webb-Kenyon Act, divested liquor of its interstate commerce character.

1. The dormant Commerce Clause operates only in the absence of congressional action; where Congress has acted, there is no dormant Commerce Clause issue. Congress may authorize States to do that which they otherwise could not—including discriminate against out-of-state interests. *E.g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946).

2. The Webb-Kenyon Act prohibits the "shipment or transportation" of liquor into a State in violation of its laws. 27 U.S.C. § 122. This Court has explained that the statute "took the protection of interstate commerce away from all re-

ceipt and possession of liquor prohibited by state law." *Clark Distilling*, 242 U.S. at 325. As a result, as this Court held, "there is no possible reason" why a law such as New York's "would conflict with the commerce clause of the Constitution." *Ibid.* Petitioners essentially ignore the Webb-Kenyon Act, and do not so much as cite this Court's decision in *Clark Distilling*. Their treatment of controlling authority speaks volumes of the weakness of their position.

III. Petitioners urge this Court to apply a novel form of constitutional analysis under which laws that are squarely within the ambit of Section 2 must nonetheless still be subjected to dormant Commerce Clause scrutiny. Although petitioners tout this approach as a necessary recognition that both provisions are part of the same Constitution, their analysis turns out to be all Commerce Clause and no Twenty-first Amendment. If this Court were to adopt petitioners' hybrid approach as correct, the Twenty-first Amendment would require that the unique constitutional status of liquor be given significant weight in the dormant Commerce Clause analysis. Since New York's regime is not facially discriminatory and does not unduly burden interstate commerce, it does not violate the dormant Commerce Clause even if the same regime would have constitutional difficulty as applied to commodities other than liquor.

IV. If there is any constitutional defect in the New York regulatory regime, the appropriate remedy is to sever and strike the offending provisions. Rather than opening the State's borders to unregulated liquor by judicial fiat, as petitioners request, all liquor should be channeled through the three-tier system.

ARGUMENT

In asking this Court to reinstate the injunction entered by the district court—which precluded the responsible state officials from enforcing New York's statutory ban on direct shipment of wine from unlicensed producers to New York

consumers—petitioners seek nothing less than the dismantling of New York's 70-year-old three-tier distribution system. Petitioners' argument fails for four reasons. *First*, the relief they seek is foreclosed by § 2 of the Twenty-first Amendment, which removes state laws regulating the importation and sale of alcohol from scrutiny under the dormant Commerce Clause. *Second*, by enacting the Webb-Kenyon Act—and reenacting that statute after the repeal of Prohibition—Congress expressly authorized the New York statutes challenged by petitioners here, and that congressional authorization necessarily is fatal to petitioners' challenge under the *dormant* Commerce Clause. *Third*, New York's regulatory regime would pass muster under the hybrid approach that petitioners themselves proffer as an accommodation between the dormant Commerce Clause and the Twenty-first Amendment. *Fourth*, and finally, even if the New York scheme could be said to unconstitutionally discriminate in favor of in-state wineries, the appropriate remedy is not to open the floodgates to all unlicensed vintners but rather to require all producers, in-state and out-of-state, to sell only through the traditional three-tier structure.

I. New York's Direct-Shipment Ban Cannot Violate The Dormant Commerce Clause In Light Of Section 2 Of The Twenty-first Amendment

Although petitioners spend much ink touting the virtues of farming and the richness of this country's agricultural history, the legal issues before this Court have little if anything to do with viticulture or premium winemaking. The question before the Court is whether petitioners are entitled to opt out of New York's licensing requirements and to "compete" with regulated in-state entities by creating their own unregulated interstate market in liquor. To the extent history is relevant to the issues before the Court, it is the history of our Nation's experiment with Prohibition and the unique constitutional compromise on the issue of alcoholic beverages—the history that produced the Twenty-first Amendment. Petitioners are

virtually silent on *that* history—or, for that matter, the *text* of the Twenty-first Amendment—and they are equally coy about explaining why their submissions here would not also lead to unregulated interstate sales of alcoholic beverages other than premium wine—beer, whiskey, rum, bourbon or vodka.

Petitioners' argument is squarely foreclosed both by the text and the history of the Twenty-first Amendment. As to text, Section 2 of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. There can be no dispute that the direct shipment of wine (or beer, whiskey, rum, bourbon or vodka)—*i e.*, the "transportation or importation" of liquor from an unlicensed seller to an unlicensed buyer—is "in violation of the laws" of New York. *See* ABC Law §§ 102(1)(c) and (d). Under the plain terms of the Twenty-first Amendment—and regardless of what otherwise might be the case under the dormant Commerce Clause for commodities other than liquor—such direct shipments are "prohibited"—period.

As to history, petitioners do not dispute that the contemporary understanding of the Twenty-first Amendment by those who lived through its framing cannot be reconciled with the dormant Commerce Clause claim that petitioners press here. Nor can they: not only did Congress promptly reenact the Webb-Kenyon Act—adding its own imprimatur to the States' virtually unqualified power over liquor commerce—but barely three years after the Amendment was ratified, this Court unanimously refused to interpret the new amendment as petitioners would have the Court do here. *See State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936). Petitioners nonetheless dismiss "[t]his Court's early cases" without discussion and—relying on a string of law review commentaries—contend that this Court's "more re-

cent cases" should lead to a different outcome. Pet. Br. 33 n.22.

Petitioners' contention is doubly flawed. First, it gets exactly backward the rule that this Court generally applies to constitutional adjudication—*viz.*, that "in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex parte Bain*, 121 U.S. 1, 12 (1887). Although that interpretive approach has been applied by this Court to countless provisions of the original Constitution and to constitutional amendments (*see, e.g.*, *Myers* v. *United States*, 272 U.S. 52, 175 (1926) (collecting authorities); *see also Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986); *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936)), petitioners do not even attempt to explain why their more "recent" understandings should trump the judgment of those who lived through Prohibition and its repeal. Second, and more fundamentally, petitioners are wrong to suggest that in its "recent cases" this Court has somehow departed from its original understanding of Section 2. This Court's Twenty-first Amendment cases, whether "early" or "more recent," *all* compel the conclusion that New York's three-tier system is constitutional.

A. The Twenty-first Amendment Authorizes States To Prohibit, Restrict, Or "Discriminate" Against The Importation Of Out-Of-State Liquor

1. In its first decision construing the Twenty-first Amendment, this Court emphasized that "the language of the Amendment is clear." *Young's Market*, 299 U.S. at 63-64. "[S]o far as concerns intoxicating liquors," the Court explained, "[t]he words used are apt to confer upon the State the power to forbid *all* importations which do not comply with the conditions which it prescribes." *Id.* at 62 (emphasis added). The plaintiffs in *Young's Market*—wholesalers who complained of a $500 license fee for imported, but not do-

mestic, beer—asked the Court "to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms." *Ibid.* The Court rejected this argument out of hand: "To say that," the Court explained, "would involve not a construction of the Amendment, but a rewriting of it." *Ibid.*

Petitioners' position in this case is no more consistent with the text of the Twenty-first Amendment than was the wholesalers' in *Young's Market*. Their contention that New York must permit *un*licensed wineries—whether in-state or outside of New York—to ship to consumers "on equal terms" with wineries licensed and regulated by the State (whether based in New York or elsewhere) is no more reconcilable with the plain terms of the Twenty-first Amendment today than it was in 1936. Indeed, *Young's Market* is dispositive of this case. The Court unanimously declared that, under the Twenty-first Amendment, a State "may permit the domestic manufacture of beer and exclude all made without the State"—or, "instead of absolute exclusion, subject the foreign article to a heavy importation fee." 299 U.S. at 63. On petitioners' view of the case, that is essentially what New York has done here: their complaint is that New York's licensing requirements, and in particular the requirement that sellers maintain an in-state presence that can be readily monitored by state regulators, amount to the imposition of a heavy import fee as a condition of shipping out-of-state wine directly to consumers. Pet. Br. 24-25.

To the extent that such conditions on the importation of liquor might be viewed as "discrimination," the fact that such "discrimination" necessarily is permitted by the plain text of the Twenty-first Amendment was not lost on this Court. To the contrary, in *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court considered a state statute that prohibited the importation of liquor with an alcohol content greater

than 25% unless such liquor was registered, but allowed such liquor produced in-state to be sold without registration. The Court sustained the statute as within the scope of authority conferred by the Twenty-first Amendment: "The statute clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere. . . . That, under the [Twenty-first] Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by [*Young's Market*]." *Id.* at 403.

One Term later, the Court again upheld against dormant Commerce Clause challenge similar state laws regulating the importation of alcoholic beverages. In *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 391 (1939), plaintiff challenged a Michigan statute that "discriminated" against out-of-state producers by prohibiting Michigan beer sellers from selling beer manufactured in any of ten specified States. Holding that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause," the Court unanimously rejected plaintiffs' claim. *Id.* at 394; *see also Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939) (upholding similar Missouri law against dormant Commerce Clause challenge and explaining that "[s]ince [the Twenty-first] amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"); *Ziffrin* v. *Reeves*, 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause").

In sum, from *Young's Market* to *McKittrick* and *Ziffrin*, every case that this Court decided in the immediate aftermath of the ratification of the Twenty-first Amendment squarely rejected—often unanimously—the very dormant Commerce Clause claim that petitioners press here. Because those decisions carry the "authority that comes from contemporaneous knowledge of the purposes of the . . . Amendment" (*Louisi-*

ana ex rel. Francis v. *Resweber*, 329 U.S. 459, 467 (1947) (Frankfurter, J., concurring)), they supply an "impressive gloss of history" as to the correct meaning of the Twenty-first Amendment. *Ludecke* v. *Watkins*, 335 U.S. 160, 165 (1948).

2. Far from being overruled or abandoned—as suggested by petitioners' laconic dismissal of them as "early" cases—the understanding that this Court expressed in those cases of the relationship between the dormant Commerce Clause and the Twenty-first Amendment has "remained unquestioned." *Hostetter*, 377 U.S. at 330. Quite simply, as the Court put it in *Hostetter*, "'[s]ince the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.'" *Ibid.* (quoting *Indianapolis Brewing*). Indeed, this Court's "more recent cases" uniformly reiterate that core holding of *Young's Market* and its progeny.[3]

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[3] *See, e.g., 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 514-15 (1996) ("The States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause'") (quoting *Ziffrin*); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984) ("§ 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause") (citing, *inter alia*, *Young's Market*); *Craig*, 429 U.S. at 206 ("This Court's decisions . . . have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause"); *see also North Dakota* v. *United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (citing, *inter alia*, *Young's Market* for the proposition that the States have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system"); *id.* at 447 (Scalia, J., concurring in judgment) (noting that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler").

Petitioners nonetheless claim that "[t]he question posed by the Court has been decided repeatedly and correctly" in their favor. Pet. Br. 38. In support of this claim, they cite fewer than half of the decisions of this Court in which the Twenty-first Amendment was construed. The decisions they cite—and, indeed, every decision of this Court in which that Amendment has been at issue—fall into three categories: (a) cases in which a State's power under the Amendment was said to be at odds with federal laws validly enacted pursuant to Congress's own authority under the Commerce Clause; (b) cases in which the State was required to comply with another express provision of the Constitution (apart from the Commerce Clause); and (c) cases involving dormant Commerce Clause challenges to state statutes that did not fall within the power conferred by the text of the Twenty-first Amendment. None of these decisions even remotely suggests that New York's ABC Law is constitutionally suspect.

a. *Hostetter* is emblematic of the first category of cases on which petitioners rely—*i.e.*, cases that involve an affirmative exercise of Congress's own commerce power in areas not expressly addressed by the Twenty-first Amendment. Congress had authorized Idlewild Bon Voyage Liquor Corporation (Idlewild) to sell bottled wines and spirits to international airline passengers departing from New York's JFK airport. Only travelers were allowed to buy such liquor, which was not distributed until arrival overseas. This Court rejected New York's claim that Idlewild's activities violated the ABC Law for two related reasons. *First*, New York's attempt to regulate Idlewild's liquor sales was unsupported by the *text* of the Twenty-first Amendment, because the "ultimate delivery and use" of the liquor in question was "not in New York, but in a foreign country." 377 U.S. at 333-34. Application of the ABC Law in these circumstances would have an impermissible extraterritorial regulatory effect—an effect that the Twenty-first Amendment does not authorize. *Second*, New York's position conflicted with a federal statute

that had been validly enacted under Congress's own constitutional power to regulate foreign commerce. *Ibid.*[4]

It was in *this* context—where Congress had passed legislation that conflicted with a state liquor law that was itself unauthorized by the plain text of the Amendment—that the Court derided as an "absurd oversimplification" the notion that the Twenty-first Amendment "has somehow operated to 'repeal' the Commerce Clause." *Id.* at 331-32. *Hostetter* did *not* hold, as petitioners misleadingly imply (Br. 33), that state laws restricting the importation of liquor for domestic consumption are subject to *dormant* Commerce Clause challenge; on the contrary, it reiterated that they are not. 377 U.S. at 330 ("a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders"). Indeed, the Court did not even suggest that Congress may, by statute, override a state law that is squarely within the text of the Amendment; it held only that New York's enforcement actions conflicted with federal laws that validly addressed foreign commerce. That holding provides no assistance to petitioners.

Similarly, nothing in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), supports petitioners' overwrought contention that the decision below "would divest Congress of its power" over anticompetitive conduct. Pet. Br. 34. *Midcal* considered a Cali-

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[4] *Hostetter* thus "involved the relation between § 2 and Congress' authority to legislate under the (positive) Commerce Clause," whereas "the *Young's Market* line concerned States' authority to regulate liquor unconstrained by the *negative* Commerce Clause in the absence of any congressional pronouncement." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 556 (1991) (O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J., dissenting).

fornia statute that required all wine wholesalers to charge for a brand of wine the price determined by the wine's producers. As in *Hostetter*, this Court concluded that California's statute was not supported by the "language" of the Amendment, because it was not addressed to the "transportation or importation" of liquor from other states. 445 U.S. at 106-07. And, as in *Hostetter*, the Court additionally concluded that the state law also conflicted with a federal statute "adopted under the commerce power," *viz.*, the Sherman Act. *Id.* at 106. Like *Hostetter*, therefore, *Midcal* provides no support for petitioners' arguments under the *dormant* Commerce Clause. Quite the contrary, *Midcal* reaffirmed that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110.

b. The second category of cases cited by petitioners holds that the States cannot "ignore their obligations under other provisions of the Constitution" (*Capital Cities*, 467 U.S. at 712)—*i.e.*, the affirmative limitations on state power, apart from the dormant Commerce Clause, that were unaffected by the Twenty-first Amendment. Thus, the fact that a state law regulates liquor does not exempt the State from complying, for example, with the Equal Protection Clause (*Craig*, 429 U.S. at 206-10) or the First Amendment (*44 Liquormart*, 517 U.S. at 516).[5]

Petitioners disingenuously assert that "this Court found no impediment to invalidating . . . discriminatory purchase

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[5] In addition to the cases in this line cited by petitioners, *see Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (striking state alcohol regulation as violative of Establishment Clause); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (same under Due Process Clause); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (same under Export-Import Clause).

rules" in *Craig*. Pet. Br. 36-37. But *Craig* involved discrimination on the basis of *sex*, which is prohibited by the Fourteenth Amendment and is not addressed in the Twenty-first Amendment. 429 U.S. at 207 n.21 ("The Twenty-first Amendment does not recognize, even indirectly, classifications based upon gender"). To the extent this case involves discrimination at all, the classifications drawn by New York are based on the unlicensed nature of out-of-state liquor—precisely the sort of "discrimination" the Twenty-first Amendment expressly allows the States to practice by prohibiting the "importation" of liquor in violation of state law. *Id.* at 206-07. Indeed, the cases in this category uniformly reiterate the States' broad authority to regulate the transportation or importation of alcoholic beverages intended for domestic use. *See, e.g., Capital Cities*, 467 U.S. at 712 ("The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders"); *James B. Beam Distilling*, 377 U.S. at 346 ("We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders").

As *Craig* put it, the Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause," but "beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." 429 U.S. at 206. *Craig* and the other cases in this category involved those other provisions, whereas this case involves only the dormant Commerce Clause. Since the only issue before the Court is whether New York's ABC Law is invalid under the dormant Commerce Clause, these cases stand as no barrier to the enforcement of New York's direct-shipment ban.

c. The third, and final, category of cases on which petitioners rely are those in which the Court considered a dor-

mant Commerce Clause challenge to state liquor laws. As previously noted, the Court's so-called "early cases" hold that the Twenty-first Amendment necessarily insulates from dormant Commerce Clause scrutiny any state laws that address the "transportation or importation" of liquor into any State for use therein.[6] No "recent" Commerce Clause case casts doubt on that conclusion. Instead, the handful of dormant Commerce Clause cases cited by petitioners involve state laws that this Court found not to be within the power conferred upon States by the plain text of the Twenty-first Amendment.

In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), for example, the Court struck down New York's price-affirmation statute, which required all distillers selling liquor to in-state wholesalers to affirm in filings with the State Liquor Authority that such sales would take place at the lowest price the distiller charged wholesalers anywhere else in the United States. The Court confirmed that "New York has a valid constitutional interest in regulating sales of liquor within the territory of New York" and that the Twenty-first Amendment "gives New York . . . the authority to control sales of liquor in New York." *Id.* at 585. But since the Amendment "confers no au-

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[6] Petitioners claim that the court below "acknowledged that the ban 'create[s] substantial dormant Commerce Clause problems.'" Pet. Br. 12. What the court of appeals *actually* said, however, was: "We fully recognize that the physical presence requirement *could* create substantial dormant Commerce Clause problems *if* this licensing scheme regulated a commodity other than alcohol." Pet. App. 26a (emphases added). But the ABC Law *does* regulate alcohol; as Judge Easterbrook put it, "§ 2 of the twenty-first amendment empowers [the States] to control alcohol in ways that [they] cannot control cheese." *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000), *cert. denied sub nom. Bridenbaugh* v. *Carter*, 532 U.S. 1002 (2001).

thority to control sales in *other* States," the Court invalidated the price-affirmation law. *Ibid.* (emphasis added).

The Court reached the same conclusion in *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), where the Court invalidated Connecticut's "price affirmation" statute. *Id.* at 342 ("Here, as in *Brown-Forman*, our finding of unconstitutional extraterritorial effects disposes of the Twenty-first Amendment issue"). *Brown-Forman* and *Healy* thus hold that the Twenty-first Amendment gives the States virtually plenary power to regulate liquor imported for domestic use, but no power to export their regulatory regimes to other states. The fact that *extraterritorial* regulations remain subject to dormant Commerce Clause challenges, however, is of no assistance to petitioners. There is no claim in this case that New York's direct-shipment ban has any extraterritorial regulatory effect; on the contrary, in keeping with the plain language of the Twenty-first Amendment, the New York provisions challenged here restrict only unlicensed sellers who seek to import liquor for use within the State.[7]

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984), which petitioners tout as "[t]he paradigm case for analyzing facially discriminatory barriers to commerce in alcohol" (Br. 35), is similarly inapposite. *Bacchus* involved a Hawaii statute that imposed a 20% excise tax on liquor but exempted certain locally produced products, such as pineapple wine, from the tax. The Court found that the statute was not "closely related to the powers reserved by the Twenty-first

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[7] The extraterritoriality decisions do not break tradition with *Young's Market*, as petitioners intimate (Br. 34); to the contrary, they follow directly from an "early decision" giving effect to the plain text of the Amendment's "delivery or use" phraseology. *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938) (holding that California could not regulate the sale of alcohol in a federal enclave).

Amendment" (*id.* at 275-76)—in fact, as the case came to this Court, the statute was not within the "powers reserved" by the text of the Amendment *at all*, since it did not purport to regulate the "importation" or "transportation" of alcoholic beverages for "delivery or use" within the State of Hawaii. Indeed, the State had "expressly disclaimed any reliance upon the Twenty-first Amendment in the court below" (*id.* at 274 n.12), and "instead acknowledge[d] that the purpose [of the statute] was to promote a local industry." *Id.* at 276. The amendment was not even cited in the litigation until the State filed "its brief on the merits in this Court." *Id.* at 274 n.12.

Thus, the issue in *Bacchus* was whether, despite the apparent inapplicability of the *text* of the Twenty-first Amendment, the general policies reflected in the amendment (to the extent they could be gleaned from its history) could belatedly "save" a state statute that was concededly enacted for nakedly protectionist reasons. *Id.* at 274. Relying primarily on "the obscurity of the legislative history of § 2" and "[d]oubts about the scope of the Amendment's authorization," the Court "reject[ed] the State's belated claim based on the Amendment." *Id.* at 274-76. The Court instead concluded that Hawaii's taxing structure "violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products." *Id.* at 273.

Unlike the tax scheme at issue in *Bacchus*, New York's regulatory regime dictates the conditions under which liquor can be "shipped into the state." ABC Law § 102(1)(c). In other words, New York's law regulates the *sine qua non* of "importation"—*i.e.*, the physical bringing of alcohol into the State from elsewhere. Each of this Court's decisions under the Twenty-first Amendment—old or new—has been premised on the notion that the "importation of intoxicants" is "a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Craig*, 429 U.S. at 207 (citing *Hostetter*, 377 U.S. at 330 & n.9). Thus, unlike the tax statute at issue in *Bacchus*, New York's law falls squarely within the plain text of the Amendment; there is no

need here to examine the drafting history, obscure or otherwise, to determine the extent to which the amendment's policies might extend "the scope of the Amendment's authorization" (*Bacchus*, 468 U.S. at 276) *beyond its text*. Because New York's direct-shipment ban is within the class of laws expressly described in § 2, it is immune from scrutiny under the dormant Commerce Clause.[8]

That *Bacchus* is irrelevant to laws, such as New York's, that directly regulate the *importation* of liquor for domestic consumption is demonstrated by *North Dakota* v. *United States*, *supra*, in which the author of *Bacchus* joined the *Bacchus* dissenters in a plurality opinion that expressly relied on *Young's Market* in sustaining a North Dakota law requiring special labels for liquor purchased from out-of-state distillers. The plurality reiterated that "the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." 495 U.S. at 431. The plurality further held that the "establish[ment] of a comprehensive system for the distribution of liquor within its bor-

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[8] *Bacchus* is the only decision of this Court since 1933 that has invalidated a State's regulation of intoxicants intended for domestic consumption on the dormant Commerce Clause theory that such regulation impermissibly favored local industry. As the dissent in that case made abundantly clear, this Court's precedents would have supported a decision upholding Hawaii's tax scheme despite the State's failure to articulate any Twenty-first Amendment defense until it filed its merits brief in this Court. But however that may be, *Bacchus*'s dormant Commerce Clause analysis undoubtedly is at the outer edge of what is consistent with the larger body of this Court's Twenty-first Amendment precedents. Indeed, if petitioners were correct that *Bacchus* must be read as sweepingly as they suggest, the case would become so manifestly inconsistent with so many of this Court's Twenty-first Amendment precedents as to warrant its overruling. *See* Br. of Ohio and 32 Other States as *Amici Curiae* in No. 03-1116, at 11-12.

ders" is "unquestionably legitimate" and "within the core of the State's power under the Twenty-first Amendment." *Id.* at 432. Justice Scalia, concurring in the judgment, agreed that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Id.* at 447.[9]

3. In sum, *all* of this Court's Twenty-first Amendment decisions make clear that state statutes that regulate the "transportation or importation" of alcoholic beverages "for delivery or use [within the State]," are immune from dormant Commerce Clause challenge. *See* Pet. App. 17a, 23a-24a; *Bridenbaugh*, 227 F.3d at 853. Because the New York statute challenged in this case directly regulates the importation

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[9] Petitioners quote Justice Scalia's statement that his concurrence in *North Dakota* "is not to say, of course, that the State may enact regulations that discriminate." Pet. Br. 35. What Justice Scalia actually said was that States may not "enact regulations that discriminate *against the Federal Government*." 495 U.S. at 448 (emphasis added). The impermissibility of that kind of "discrimination," however, has nothing to do with the dormant Commerce Clause, but flows instead from doctrines of intergovernmental immunity not at issue here. Petitioners similarly twist Justice Scalia's words when they assert that a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." Pet. Br. 35. The omitted context makes clear that the "discriminatory character" adverted to by Justice Scalia in *Healy* was the law's "imposition of price restrictions" on beer sold in *other* States, not the State of importation. *Healy*, 491 U.S. at 344 (concurring opinion). Finally, Justice Scalia's concurrence in *North Dakota* can hardly be read, as petitioners suggest (Br. 31), to mean that a State can require "all," but not less than "all," liquor to pass through a three-tier system. Indeed, if that were what Justice Scalia meant, his decision to provide the fifth vote to uphold North Dakota's regulatory scheme—which gave the federal government the "option" to buy liquor *outside* of the three-tier system—would be inexplicable. 495 U.S. at 447-48.

of liquor for domestic use, petitioners' dormant Commerce Clause claim necessarily founders on the plain text of the Twenty-first Amendment.

B. New York's Regulation Of The Importation And Distribution Of Liquor Furthers The Core Purposes Of The Twenty-first Amendment

New York's ABC Law regulates the "importation" of liquor for "delivery" within the State. As a result, unlicensed direct shipments "in violation of" that law are expressly "prohibited" by § 2 of the Twenty-first Amendment. Accordingly, it does not matter whether New York's law furthers the "core concerns" of the Twenty-first Amendment. *Bridenbaugh*, 227 F.3d at 851 ("our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters").

Even if, however, the Court felt it necessary to look beyond the plain language of the Twenty-first Amendment, and examine whether New York's statute is consistent with the Twenty-first Amendment's "purposes" or "concerns," such review would yield the same result: New York's statute is constitutional. In upholding the challenged statute at issue in *North Dakota*, the plurality stated that North Dakota's "unquestionably legitimate" three-tier distribution system served the State's interests of "promoting temperance, ensuring orderly market conditions, and raising revenue." 495 U.S. at 432. Likewise, as the comprehensive record here demonstrates and the court of appeals found, New York's three-tier system "is aimed at the regulatory interests directly tied to the importation and transportation of alcohol for use in New York." Pet. App. 27a (citing *North Dakota*, 495 U.S. at 432).

1. By requiring all who traffic in alcoholic beverages to be licensed and to maintain a physical presence within the State, New York ensures "orderly market conditions" through transparency and accountability. The ABC Law allows the State "to monitor the distribution and sale of alco-

holic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the [State Liquor Authority]." Pet. App. 25a.

Those who wish to sell liquor in New York are subject to a host of legitimate state regulatory requirements. These include bonding of licensees and permittees (ABC Law § 112), labeling requirements and brand name registration (§ 107-a), bottling requirements (§ 96-a), price-posting requirements (§ 101-b), transportation requirements including bills of lading (§ 117), and the maintenance of detailed records (§ 103). *See also* C.A. App. 1726-29. The physical presence requirement ensures that "[r]ecords of sales and compliance with New York's regulatory requirements" are "available for inspection" by New York officials. Pet. App. 25a; *see Milton S. Kronheim & Co.* v. *District of Columbia*, 91 F.3d 193, 203-04 (D.C. Cir. 1996) ("legitimate state interests which would be promoted by requiring geographic proximity of warehouses" include "auditing company records, monitoring compliance with the ABC laws, monitoring licenses, [and] checking tax forms for audits"). In addition, the bond required of all licensees is available to state officials for the assessment of any fines. Pet. App. 26a.

It would be virtually impossible for New York officials to monitor compliance with this complex and reticulated regulatory regime by every out-of-state entity that wished to ship liquor to consumers within the State. As the court of appeals observed, "[i]n 2000, there were over 2,100 wineries in the country, a 275% increase since 1975. Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless." Pet. App. 28a. Indeed, if New York were to dispense with its presence requirement as a condition for the issuance of licenses, the costs of such enforcement burdens would effectively convert its regulatory scheme for liquor into an "honor system." But as the evidentiary record in this case demonstrates, New York is well justified in believing that those in

petitioners' position would not voluntarily abide by the law: when asked about unlicensed direct shipments that they may have made in the past, the winery petitioners declined to answer on the basis of the Fifth Amendment privilege against self-incrimination. *See* C.A. App. 1214-25.

For all these reasons, "New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol." Pet. App. 26a. This undoubtedly puts economic burdens on those who would sell liquor in New York, as petitioners contend (Br. 24-25); but there is no reason why they should be able to shift to the State their costs of doing business. "Section 2 does not require that New York bear the burden in attempting to ensure proper compliance with its . . . regulatory system regarding imported wine." Pet. App. 28a. New York has made the rational determination that a physical presence is required to assure that those in the liquor trade play by the rules (Pet. App. 27a-28a); out-of-state wineries may establish such a facility if they wish to sell directly to New York consumers, or they may avail themselves of the traditional three-tier system.[10]

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[10] Direct shipment of liquor by unlicensed (and hence unaccountable) out-of-state producers would also interfere with two other state interests that lie at the core of the Twenty-first Amendment: The promotion of moderation, and the collection of revenue. With respect to the first, a principal objective of the ABC Law is "fostering and promoting temperance." J.A. 11 (ABC Law § 2). The undisputed evidence showed a much greater incidence of wine consumption (40%) and binge drinking among both minors (16.5%) and all drinkers (10.5%), in States that permit direct shipping as compared to States (such as New York) that do not. C.A. App. 763-66, ¶¶ 30-37, 38-39; 1252-1363; 1366-69. A leading expert on alcohol abuse testified that direct shipping is "bad public policy for any state such as New York that wants to promote temperance" and will result in more underage drinking. J.A.

2. Petitioners object that the three-tier system raises prices and reduces consumer choice. Pet. Br. 7-8, 15.[11] Even if that were true, it would be irrelevant to the constitutional question in this case. New York is under no constitutional command to make liquor available cheaply, or in great variety, to its citizens; on the contrary, the Twenty-first Amendment allows the State to control what (if any) kind of liquor is available, and at what price. As this Court put it in *Young's Market*, "a State might establish a state monopoly of

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129, ¶ 1; J.A. 134, ¶¶ 14-15; J.A. 137-38, ¶ 25. With respect to the second, the three-tier system ensures the collection and remittance of excise and sales taxes on alcohol by parties licensed by, and physically present in, the State. Again, the evidence was undisputed that New York's regulatory system "provides an extremely effective mechanism for tax collection." J.A. 70, ¶ 22; *see also* C.A. App. 867-68; 892-93; 2714-16; 2721-22; 2724-28; 2764-65; 2767-70; 2812-14; 2837-39. By contrast, attempting to collect taxes from out-of-state shippers both would raise constitutional concerns (*see Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992)) and would be "extraordinarily difficult as a practical matter" to enforce. C.A. App. 2722; *see also* J.A. 70.

[11] In this regard, petitioners place much reliance on a report prepared by *the staff* of the Federal Trade Commission regarding the supposed consumer "benefits" of direct shipment. Pet. Br. 8, 37, 43-44. This staff report does not reflect the official position of the FTC, much less the federal government. It consists largely of factual assertions that are not part of the record and were not subjected to the adversarial process, and thus can provide no basis for decision. In fact, the staff report is based on a study of one small market (McLean, Virginia) that has nothing to do with New York market conditions as established in the evidentiary record in this case. Moreover, because it "takes no position on the constitutional issues raised in the lawsuits" (Report at 9), it is irrelevant to the legal questions before the Court. And it cannot, of course, serve as a substitute for the brief the Acting Solicitor General apparently has decided not to file.

the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee." 299 U.S. at 63. All of those options would raise prices and reduce choice, but none has ever been thought remotely unconstitutional.

Petitioners also claim that New York's system was adopted for "protectionist" purposes. Pet. Br. 19. That contention is wrong for at least two reasons. First, if New York's statutes are squarely within the power granted to the State by the plain text of the Constitution, it would scarcely matter *why* New York chose to restrict liquor importation as it has. Second, the court of appeals correctly concluded that petitioners' claim of protectionism does not withstand scrutiny. As that court noted, there is "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests." Pet. App. 25a.

Petitioners first assert that the ABC Law was amended in 1970 "to close direct shipment loopholes" in order to "'prevent . . . competition with New York state licensees.'" Pet. Br. 19 (quoting *House of York, Ltd.* v. *Ring*, 322 F. Supp. 530, 533 (1970)). As the district court's decision in *York* makes clear, New York decided that mail-order deliveries of liquor from unlicensed, overseas shippers were disrupting "orderly market conditions" within the State, as well as the efficient operations of the tax and customs laws, and acted to put an end to such deliveries—as the Twenty-first Amendment authorized it to do. 322 F. Supp. at 533 ("The twenty-first amendment to the Constitution is dispositive of plaintiffs' claim that the disputed statute violates the Commerce Clause").

Petitioners also complain that the New York legislature voted in 1995 to authorize direct shipment, but that this bill was vetoed by the governor. This complaint, however, is political, not constitutional. Petitioners essentially ask this

Court to override the governor's veto—which after all is part of the process by which bills become law in New York—and legislate an outcome that the State's political branches have declined to produce. The Twenty-first Amendment precludes such interference with New York's right to control the traffic of liquor across its borders.[12]

Finally, petitioners assert that the exemptions allowing licensed, in-state wineries to ship directly to consumers "are intended to promote New York wineries." Pet. Br. 20. New York has decided that the physical presence of these wineries is sufficient to ensure compliance with the regulatory structure, such that they may be granted limited exemptions from the three-tier system. Pet. App. 25a-26a. This clearly legitimate determination by the State is not rendered invalid merely because it may redound to the economic benefit of in-state wineries. Indeed, under these limited in-state delivery exceptions, it is still the case that every drop of alcohol distributed in New York must pass through a licensed in-state party whose premises and records are easily and readily available to the State. The same opportunity is available to those out-of-state wineries that elect to subject themselves to the same regulatory burdens.

In sum, whether the Court examines New York's statute under the plain language of the Twenty-first Amendment, the purposes of the Twenty-first Amendment, or both, the result

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[12] Similarly, petitioners contend that although "the advent of the Internet" (Br. 32) makes it technologically possible "for consumers to obtain any wine from any winery" (Br. 7), political forces have prevented such a regime from becoming legally possible (Br. 5, 7-8, 18-20, 37 & n.25). But as the court of appeals correctly recognized: "Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment." Pet. App. 29a.

is the same—New York's three-tier regulatory scheme unquestionably is constitutional.

II. New York's Regulatory Scheme Cannot Violate The Dormant Commerce Clause In Light Of The Webb-Kenyon Act

Wholly apart from the Twenty-first Amendment, the dormant Commerce Clause is not implicated here because Congress, in enacting (and reenacting) the Webb-Kenyon Act, has exercised its plenary power under the Commerce Clause, and expressly authorized the States to pass statutes such as New York's prohibition on the direct shipment of liquor from unlicensed, out-of-state producers to in-state consumers.

1. It is axiomatic that the dormant Commerce Clause comes into operation only in the *absence* of congressional action. As this Court has explained: "It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986). In other words, Congress, in the exercise of its affirmative authority under the Commerce Clause, may authorize the States to do that which they otherwise would be precluded from doing by the "dormant" aspect of the Clause.

That principle controls here because, quite apart from the controlling effect of the Twenty-first Amendment, Congress has plainly authorized the provisions of New York's liquor laws that petitioners challenge. The Webb-Kenyon Act—originally enacted in 1913 and reenacted in 1935—prohibits "[t]he shipment or transportation" of liquor "from one State . . . into any other State . . . in violation of any law of such State." 27 U.S.C. § 122. This language is clear and unambiguous. It authorizes the several States to restrict importation of liquor on whatever terms they deem appropriate. Any

ambiguity is resolved in the States' favor by the title of the statute—"[a]n act divesting intoxicating liquors of their interstate character in certain cases." *Id.*; *see FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959). New York's ABC Law, which directly regulates the "shipment or transportation" of liquor into the State, is well within the "certain cases" described by the statute. Quite simply, there is no basis for concluding that the Commerce Clause is "dormant" in this case.

Indeed, in *Clark Distilling* this Court already ruled that the unmistakable purpose of the Webb-Kenyon Act was "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws." 242 U.S. at 324; *see also id.* at 325 ("the Webb-Kenyon Act . . . took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law"); H.R. REP. NO. 1461, 62d Cong., 3d Sess. 1 (1913) (Webb-Kenyon "withdraw[s] the protecting hand of interstate commerce from intoxicating liquors transported into a State"). And in the same case this Court also ruled that—notwithstanding claims of "discrimination"—*no* Commerce Clause claim can survive with respect to state laws that regulate the importation of liquor for domestic use. As the Court explained, because the shipment and receipt of liquor had been "in express terms divested by the Webb-Kenyon Act of their interstate commerce character," there is "no possible reason for holding that to enforce the provisions of the state law would conflict with the commerce clause of the Constitution." *Id.*[13]

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[13] Petitioners might argue that the Webb-Kenyon Act only applies to States that prohibit the distribution and sale of liquor altogether. *See Bolick* v. *Roberts*, 199 F. Supp. 2d 397, 431 n.24 (E.D. Va. 2002) (citing *Adams Express Co.* v. *Kentucky*, 238 U.S. 190, 199-200 (1915), for this proposition), *vacated as moot sub nom. Bolick* v. *Danielson*, 330 F.3d 274 (4th Cir. 2003). In *Clark*

The principle that Congress may exempt even overtly discriminatory state laws from Commerce Clause scrutiny has been repeatedly reaffirmed by this Court since its decision in *Clark Distilling*. *See, e.g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946); *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983).[14] As the Court put the point in *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Id.* at 652-53.

Here, Congress reenacted the Webb-Kenyon Act without change after *Clark Distilling* broadly construed the original

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Distilling, however, this Court rejected that precise claim (242 U.S. at 324) and also noted that "[a]ll that was decided" in *Adams Express* was that the Webb-Kenyon Act did not apply on the facts, because "the court of last resort of Kentucky . . . had held that the state statute did not forbid shipment and receipt of liquor for personal use." *Ibid.*

[14] In *Benjamin*, for example, Prudential challenged on dormant Commerce Clause grounds a South Carolina statute that imposed a tax on out-of-state insurance firms doing business in the State that did not apply to in-state insurers. 328 U.S. at 410-11. Although *Benjamin* "assumed" for purposes of its analysis that the tax was "discriminatory"—as, at least under petitioners' theory of "discrimination," it clearly was, *id.* at 429—it held that there was "[n]o conceivable violation of the commerce clause, in letter or spirit." *Id.* at 436. That was because Congress was deemed to have authorized such discrimination by enacting the McCarran-Ferguson Act, and Congress—the Court held—"is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade." *Id.* at 434 (footnote omitted).

statute as removing the protections of interstate commerce from "all receipt and possession of liquor prohibited by state law." 242 U.S. at 325. Congress must therefore be deemed to have adopted that interpretation of the statute. *See Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). Because New York's regulatory regime clearly falls within the scope of the congressional authorization, it necessarily is "invulnerable to Commerce Clause challenge." *Western & Southern Life Ins. Co.*, 451 U.S. at 652-53.

2. Petitioners devote but a single sentence to the Webb-Kenyon Act, in which they assert that the statute "narrowed the scope of the Commerce Clause but did not eliminate it." Pet. Br. 31. That assertion cannot be reconciled with this Court's decision in *Clark Distilling*, which expressly held that the Webb-Kenyon Act *did* "eliminate" any Commerce Clause impediments to state restrictions on the importation of liquor from other States. *See* 242 U.S. at 327 (Congress "permitt[ed] the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another state"). Petitioners do not cite, much less adequately distinguish, *Clark Distilling*, nor do they ask that it be overruled. It squarely forecloses not only their effort to explain away the consequence of the Webb-Kenyon Act but also the entirety of their constitutional challenge to the New York direct-shipment ban.

Perhaps recognizing that the Webb-Kenyon Act is dispositive of this case, petitioners seek to divert the Court's attention by discussing an *earlier* statute—the Wilson Act. Pet. Br. 31 (citing *Scott* v. *Donald*, 165 U.S. 58, 100 (1897)). Although petitioners appear to believe that the Wilson Act embodies a congressional mandate of non-discrimination, the case they cite merely concluded that the Congress, in passing that statute, had not intended completely to displace the dormant Commerce Clause. *See Scott*, 165 U.S. at 92; *see also Clark Distilling*, 242 U.S. at 323; *Vance*, 170 U.S. at 448-50. In other words, as interpreted by this Court, the Wilson Act reversed the result of *Leisy*, but left intact *Bowman*'s holding.

But none of that is of any help to petitioners, because, as is clear from *Clark Distilling*, the later-enacted Webb-Kenyon Act effectively abrogates *Bowman*, *Rhodes*, and *Vance*.[15]

Indeed, the fact that this Court had interpreted the Wilson Act so as not to displace entirely the Commerce Clause with respect to liquor—and thus to permit *some* Commerce Clause challenges to state laws that regulated liquor importation—but had interpreted the later-enacted Webb-Kenyon Act so as to remove "all" Commerce Clause objections to such regulations presumably explains why Congress reenacted the Webb-Kenyon Act, but not the Wilson Act, in

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[15] It is instructive to compare petitioners' core assertion in this case—*i.e.*, that the dormant Commerce Clause precludes enforcement of New York's prohibition on shipping out-of-state liquor directly to consumers—with *Vance*, where the Court held that "the inhibitions of a state statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident for his use." 170 U.S. at 452. If this aspect of *Vance* had remained the law, petitioners' claim would be well-founded, since it presumably makes no constitutional difference whether the in-state consumer places his order by mail (as in *Vance*) or over the telephone or Internet. But the Commerce Clause analysis of *Vance* is *not* the law that applies to liquor shipments. Congress enacted the Webb-Kenyon Act specifically to repudiate that aspect of *Vance* (and the analogous views expressed in *Rhodes*) and to stem the burgeoning mail-order liquor trade made possible by this Court's decisions. *See Clark Distilling*, 242 U.S. at 323-24; 49 CONG. REC. 699-700 (Dec. 16, 1912) (Sen. Sanders); 49 CONG. REC. 761 (Dec. 17, 1912) (Sen. Kenyon); 49 CONG. REC. 2,898 (Feb. 10, 1913) (Sen. Curtis). The purpose of Webb-Kenyon, in other words, was to allow States to do precisely what petitioners claim that New York may not—restrict the importation of liquor from out-of-state sources. This Court will avoid interpreting a statute in a manner inconsistent with its text and manifest purpose. *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 827 (1997); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 237 (1985).

1935. Although neither statute had been formally repealed during Prohibition, Congress was careful to turn square corners to make doubly sure that the Webb-Kenyon Act would retain its effectiveness. In light of this Court's cases construing both statutes, however, it must have been evident then—as it is today—that the Wilson Act, even if still technically on the books, retained no continuing significance with respect to the issue here.

Moreover, even if the Wilson Act retained some independent significance despite the passage of the Webb-Kenyon Act, it would still not assist petitioners in this case. The Act provides only that all liquor transported into New York "shall *upon arrival* . . . be subject to the operation and effect" of New York laws "to the same extent and in the same manner" as if such liquor had been produced in New York. 27 U.S.C. § 121 (emphasis added). In *Rhodes* and *Vance*, *supra*, this Court authoritatively construed the "arrival" requirement of the Act to mean the delivery of liquor to the ultimate consignee within the State, rather than passage of the liquor through the State's border. Congress has not amended the Wilson Act in any relevant respect since those decisions. Accordingly, to the extent the Act might retain independent significance, it would have no bearing on the New York laws challenged in this case, which restrict the importation of liquor *before* it "arrives" in the State by being delivered to a licensed consignee. *Rhodes*, 170 U.S. at 421-23.

In sum, even if petitioners are right that New York's ABC Law "discriminates" against interstate commerce, any such discrimination is authorized by the Webb-Kenyon Act. The Webb-Kenyon Act, as construed by this Court in *Clark Distilling*, plainly answers the question presented in this case by disposing of any conceivable challenge under the dormant Commerce Clause to New York's direct-shipment ban.

III. New York's Regulatory Scheme Is Constitutional Even Under Petitioners' Proposed Analysis Of The Dormant Commerce Clause

Petitioners make much of this Court's recognition in *Hostetter* that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," and that "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter*, 377 U.S. at 332. On the basis of such statements, petitioners urge the Court to "accord dignity to both the Commerce Clause and [the] 21st Amendment." Pet. Br. 39. As already explained, not only have petitioners uprooted such language entirely from its context, but they have also overlooked the fact that the Commerce Clause simply is not "dormant" in this case. But even if this Court were to overlook those failings and adopt petitioners' proposed analytical approach—*i.e.*, to "accord dignity" to both constitutional provisions—the conclusion that petitioners urge would not follow, because petitioners fail to practice what they preach: Their dormant Commerce Clause analysis gives *no* weight to the special constitutional status of alcoholic beverages.

Petitioners ignore the long history of alcohol regulation, including its constitutional and statutory underpinnings, and analyze New York's prohibition on the unregulated importation of liquor under the same "dormant" Commerce Clause standards applicable to commercial products and services such as milk or trash processing. *See* Pet. Br. 24 (citing *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951), and *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994)). By so doing, petitioners fail to perform the "accommodation of the Twenty-first Amendment with the Commerce Clause" that their own reading of precedent and the constitutional text would necessarily require. *Hostetter*, 377 U.S. at 333.

This Court has made clear that "the Twenty-first Amendment requires" an "added presumption in favor of the

validity of . . . state regulation" of liquor. *California* v. *LaRue*, 409 U.S. 109, 118-19 (1972). Even where another constitutional provision is clearly implicated, "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment." *Id.* at 115. Or, as the plurality put it in *North Dakota*: "Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." 495 U.S. at 433 (citing *Capital Cities*, 467 U.S. at 714).

Petitioners complain that the New York regime is "discriminatory" because out-of-state liquor producers must sell to a licensed wholesaler, whereas some in-state wineries may obtain a license to sell directly to consumers. Pet. Br. 20. But this case comes to the Court on a full evidentiary record—a record on which petitioners utterly failed to establish that New York's licensing requirements have a discriminatory effect. In fact, petitioners' expert conceded in the district court that elimination of the direct-shipment ban would not "change anything"—*i.e.*, even if the identity of particular out-of-state shippers might change at the margins, the volume of out-of-state wine sold in New York would remain the same regardless. C.A. App. 1090-91; 1106-07.

Petitioners again conceded in their brief before the Second Circuit that the direct-shipping ban does not "impact" the "volume" of wine flowing into New York. Pet. C.A. Br. 33. Those concessions are dispositive of any claim of discriminatory impact. As this Court noted in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127-28 (1978), "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulation." Thus, "interstate commerce is not subject to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate seller to another." *Id.* at 127.

Moreover, petitioners acknowledge that out-of-state wineries may obtain the same license to ship directly to consumers as in-state wineries by establishing a physical presence within the State. Pet. Br. 21. Although they contend that requiring a New York presence amounts to discrimination *per se* (*id.* at 23), petitioners simply ignore the fact that *per se* rules are rarely applicable where, as here, Congress has legislated in the area. *Cf. United States* v. *NASD*, 422 U.S. 694, 729-30 (1975). This principle applies *a fortiori* where, also as here, the Constitution confers regulatory authority on the States. The Twenty-first Amendment "gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity." *Duckworth* v. *Arkansas*, 314 U.S. 390, 399 (1941) (Jackson, J., concurring). The State's legitimate interest in liquor regulation is ample justification for a physical presence requirement. *Cf. Ziffrin*, 308 U.S. at 139 (upholding licensing requirement as "clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenue"). Petitioners therefore have not established that New York's regulatory regime is facially discriminatory.[16]

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[16] Petitioners contend that even if the physical presence requirement is constitutional, the "easiest direct sales and shipping options . . . are available only to wines made from New York grapes." Pet. Br. 26-27 ("ABC Laws §§ 76(2)(a) (tastings); 76(4) and 77(4)(b)(4) (allowing sales and deliveries of New York state labeled wines from other wineries and at dinner theaters); 76(5) (allowing sales at state and county fairs and farmers [sic] markets); 77(5) (allowing sales on Sundays and at the state fair)"). These limited, on-site sales provisions are truly *de minimis*, which presumably explains why petitioners did not raise any objection to them in the courts below. Indeed, it is hard to see a logical connection between any Commerce Clause objection that might be framed against these on-site tasting provisions, and the remedy that

In light of the Twenty-first Amendment, it cannot be disputed that state regulation of the importation and distribution of liquor serves a "legitimate local public interest" as that term is used in this Court's dormant Commerce Clause cases. *E.g.*, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Since the direct-shipment ban is not "discriminatory," it "will be upheld" unless the burden on interstate commerce is "clearly excessive" in relation to the State's interest in liquor regulation and licensing. *Ibid.* In performing this balancing, the Twenty-first Amendment must weigh heavily on the State's side of the scale. That focus necessarily requires a recognition that the only "burden" imposed by New York law on out-of-state liquor sellers is to bring them within the same tightly controlled and heavily monitored regulatory framework in which every other New York licensee is required to operate.[17]

Petitioners have not even acknowledged, much less attempted to carry, their burden of showing that New York's ABC Law so impedes commerce as to preclude the State

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petitioners seek here. Petitioner Swedenburg is not asking that she be permitted to transport a bottle of her wine to New York in order to conduct a tasting at a state fair; she and the other petitioners seek to ship directly to consumers throughout the State without regard to New York's licensing requirements. In other words, petitioners now seek to uproot New York's entire regulatory tree on the basis of this belatedly marshaled "discriminatory" twig.

[17] As this Court has noted in other contexts, the "dormant Commerce Clause has no job to do" where the products in question are not similarly situated. *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 298-99, 303 (1997). Here, *all* wine that is lawfully delivered in New York—whether imported through wholesalers or shipped directly to consumers from a New York winery—is *regulated*. By contrast, petitioners ultimately seek to create an entirely different market for out-of-state wine than the market in which *all* New York wine must compete—an *unregulated* interstate market.

from exercising its constitutional prerogative to restrict the importation of liquor. Petitioners' own proffered "hybrid" analysis of the constitutional issues in this case—properly performed—compels the rejection of their claims.

IV. If There Is Any Constitutional Defect In New York's Regulatory Scheme, The Remedy Should Be Narrowly Tailored

Petitioners concede that New York could constitutionally "require that *all* wine, not just wine delivered from out-of-state wineries, [to] pass through the three-tier system." Pet. Br. 40. Their complaint is that *some* wine—wine sold by licensed in-state wineries—can "bypass" this system and ship directly to consumers. If the Court were to conclude that this scheme is constitutionally defective, then the remedy is to sever and strike the exemptions allowing direct shipment by licensed, in-state wineries—not, as the district court thought, to open up New York's liquor market to all unlicensed out-of-state producers.

Severability is a question of state law, and where state law allows severance of an offending provision there is no cause to invalidate more of the statute than necessary. *Leavitt* v. *Jane L.*, 518 U.S. 137, 143-44 (1996); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985); *see also McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40, 51-52 (1990). "Under New York law, a court should refrain from invalidating an entire statute when only portions of it are objectionable." *Gary D. Peake Excavating Inc.* v. *Town Board*, 93 F.3d 68, 72 (2d Cir. 1996) (internal quotation marks and citation omitted); *see also New York ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 60 (1920) (Cardozo, J.).

The ABC Law expressly provides that if "any part, provision or section" is "held invalid by any court," the rest of the statute "shall not be affected thereby." ABC Law § 161 (J.A. 16). The law authorizing direct shipment by "farm

wineries" also contained its own severability clause. 1993 N.Y. Laws 1194, 1202, ch. 490, § 24.

Thus, the New York legislature has made clear that any provision of the ABC Law found to be invalid should be severed from the whole, so as to preserve the integrity of the overall regulatory framework. The district court found constitutional fault with only those provisions of the ABC Law that allow in-state wineries to ship their wines directly to in-state consumers. Pet App. 53a n.20 ("The Court is *not* here ruling that New York's three-tier system (standing alone and apart from its exceptions) is unconstitutional"). Striking only those provisions would work the least intrusion on the ABC Law by maintaining the overall regulatory framework requiring all those trafficking in alcoholic beverages to be licensed by and, thus, accountable to the State. *See Beskind* v. *Easley*, 325 F.3d 506, 516, 518-19 (4th Cir. 2003).

More than 90% of the wine sold in New York comes from other States. J.A. 87-88 & n.25. The remedy requested by petitioners—the complete elimination of the direct-shipment ban—would allow a flood of wine (not to mention rum, bourbon, and beer) to evade the New York regulatory regime by going directly from unlicensed, out-of-state producers or other purveyors to in-state consumers. By contrast, wine lawfully shipped directly to New York consumers currently comprises less than 0.5% of all wine sales in the State. J.A. 208-12. Requiring this relative trickle to flow through the three-tier system by severing and striking the exemptions of which petitioners complain would work a far less drastic undoing of New York's complex and reticulated scheme of alcoholic beverage control.[18]

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[18] *Califano* v. *Westcott*, 443 U.S. 76 (1979), does not, as petitioners contended below, suggest that the proper remedy is the extension of the in-state delivery options to out-of-state producers. *First*, in *Califano*, the Court was dealing with severability issues

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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governed by *federal* law, not New York law. *Second*, as *Califano* makes clear, the principle that extension is the proper remedy applies to federal statutes involving benefits programs where government largesse is the legislative purpose. *See id.* at 90. Here, in contrast, the ABC Law is a comprehensive regulatory statute designed to ensure that all those trafficking in alcohol are accountable to the State—a purpose that would be defeated by allowing unlicensed, out-of-state wineries to ship their wines directly to New York consumers.

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JENNIFER M. GRANHOLM, Governor; et al.,
Petitioners,
and
MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,
Respondent,
v.
ELEANOR HEALD, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

The Command of Section 2 of the 21st Amendment is clear and unmistakable: the "transportation or importation" of intoxicating liquors into Michigan "for delivery or use therein," "in violation of the laws thereof, is herby prohibited." Respondents' proposed delivery violates Michigan law and because the challenged restrictions implement Michigan's constitutional authority, they are permissible. Respondents can prevail in their challenge only if the plain language of the 21st Amendment and the similar language in the Webb-Kenyon Act is not given effect.

Respondents seek to avoid the fact that 70 years ago the Constitution was amended to vest the individual States with authority to control the importation and transportation of this one product, free from limitations of the dormant Commerce Clause that apply to other products. Immediately after adoption of the 21st Amendment this Court upheld its clear meaning in *Young's Market*[1] and *Mahoney*.[2] It continues to acknowledge that principle in more recent decisions, e.g., *North Dakota v. United States*, 495 U.S. 423 (1990) (plurality opinion).

Michigan decided that in order to effectively supervise the traffic in alcoholic beverages all such beverages coming into the State for sale or delivery had to pass into the hands of in-State licensees over whom Michigan has effective regulatory control. Michigan's decision to only allow *intra*state shipment at retail to consumers by a limited number of licensed in-State wine makers who manufacture their own products is permissible because Michigan has effective and immediate

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[1] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936).

[2] *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938).

control over these in-State licensees. Michigan can easily audit and penalize in-State licensees who do not comply with Michigan's extensive regulatory regime.[3] Such a regulatory regime is rationally related to the legitimate governmental goals of ensuring that alcohol distribution is effectively regulated, that taxes are paid, and that underage drinkers do not have ready access to alcoholic beverages.

Much of Respondents' Counter-Statement of the Case is dedicated to a recitation of the status of the wine production industry, the alleged difficulty and cost in working through the State's three-tier system,[4] and the claimed "trend" among the States to allow out-of-State direct shipment of wine.[5] It also refers to a non-record staff report of the Federal Trade Commission (FTC) of questionable credibility. These statements and the staff report of the FTC are not relevant to a

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[3] There are only forty in-State wine makers in Michigan. Michigan does not require that only Michigan wines can be direct shipped by its licensees; rather, Michigan allows controlled direct shipment by the appropriate licensee of any wine once the product is brought under Michigan's in-State regulatory control.

[4] The only Respondent winery in this case is Domaine Alfred, Inc. It claims that Michigan's three-tier system is too costly and burdensome; however, it admitted that its uses three different wholesalers to distribute its products in other States and that it has never even attempted to enter the Michigan market or inquire about how it can enter that market. C.A. App. 193-194, 473 (Domaine Interrog. Ans. 1, 3-5), D.C. R 81, Ex C. Although the Respondent consumers claim that Michigan should have no problems with tax collection, they took the 5th Amendment when asked if they ever had alcoholic beverages shipped from a seller not licensed to sell alcohol at retail in Michigan and if they paid taxes on those beverages. C.A. App. 372-373 (Ans. to Interrog., 7). Many of the wines they sought were available in Michigan. C.A. App. 315-318 (Wendt Aff'd.). Consumers can also personally transport a case of wine into the State without going through the three-tier system. MCL 436.1203(7)(a).

[5] However, 35 States, including Ohio, Michigan, and New York, are asking this Court to uphold the States' laws regulating and banning the out-of-State importation and direct shipment of alcohol inside its borders.

proper analysis of the issue before this Court. If a State regulation concerns "whether to permit importation or sale of liquor and how to structure the liquor distribution system" – "the central power reserved by § 2 of the 21st Amendment," that is the end of the matter. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984). No requirement exists that the State regulation be narrowly drawn so as to minimize the burden on commerce, maximize profits for out-of-State wineries, or provide the greatest selection of wines to Michigan consumers. Section 2 expressly empowers States to restrict imports of alcoholic beverages in a manner that the dormant Commerce Clause would not permit as to other products.

ARGUMENT

I. When State legislation concerns the "transportation or importation" of intoxicating liquors "for delivery or use" in the State, the 21st Amendment controls.

The 21st Amendment expressly vests control over the commerce in intoxicating liquors to the States:

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. Amend. XXI, § 2.[6]

Statutory and constitutional construction rules require giving effect to the ordinary meaning of the language used. *Garcia v. United States*, 469 U.S. 70, 75 (1984). If the plain

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[6] Respondents fail to even quote the 21st Amendment in their 48-page brief. Strikingly, they concede that the "literal terms" of Section 2 suggest "all encompassing power" to the State but then argue that the literal terms don't mean what they say. Resp. Br., 18-19.

language is unambiguous, judicial inquiry ends, except in "'rare and exceptional circumstances.'" *Id.* Indeed, this Court "has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning." *Solorio v. United States*, 483 U.S. 435, 454 n. 3 (1987) (quoting *Reid v. Covert*, 354 U.S. 1, 8 (1957) (plurality opinion)). *Id.*

Shortly after the 21st Amendment's ratification by the States, this Court was called upon to interpret it in cases challenging "protectionist" State liquor laws.[7] As in the present case, the challengers in those cases argued that the 21st Amendment could not, in view of the dormant Commerce Clause, be used to treat imported liquor differently than in-State liquor. The Court concluded that such a construction would be a "rewriting" of the 21st Amendment. *Young's Market*, 299 U.S. at 62. This Court later declared that *Young's Market* had settled the question that "under the Amendment, discrimination against imported liquor is permissible." *Mahoney*, 304 U.S. at 403. This Court has never overruled the *Young's Market* line of cases with respect to a State's 21st

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[7] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936) (California's discriminatory $500 license fee for the privilege of importing beer from outside the State was upheld against a Commerce Clause challenge; *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938)(upholding Minnesota statutory limitation on the types of blended spirits imported into the State, which was not imposed upon those produced in-State); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939)(upholding a Michigan statute that prohibited the importation of beer into Michigan from distributors in States that did not allow unrestricted importation of alcohol products manufactured in Michigan); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-398 (1939)(upholding a Missouri ban on the alcohol imports from States that themselves had discriminatory import policies, Justice Brandeis held the alleged discriminatory intent of the Missouri statute to be entirely beside the point); and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939)(upholding Kentucky Act that imposed rigorous conditions on the transport and delivery of liquor).

Amendment right to control its alcohol importation and distribution system. Instead, this Court has repeatedly reiterated that this is "a regulatory area where the state's authority under the Twenty-first Amendment is transparently clear." *Craig v. Boren*, 429 U.S. 190, 206-207 (1976) *reh'g denied*, 429 U.S. 1124 (1977) (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 and n. 9 (1964)).

Respondents' argument that the *Young's Market* line of cases and the decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), did not involve "discriminatory" State liquor laws (*i.e.*, laws that drew distinctions within the challenged regulatory systems) simply does not square with the facts or holdings in those cases. Each of them involved "discriminatory" State Liquor laws that were upheld under the 21st Amendment. See No. 03-1120, MB&WWA Br., 4, 5, 12, 15-16, 24-27.

More recent decisions of this Court do not put this power of the States in question. Nor do they suggest that the plain language of the 21st Amendment, granting the States the power to control their alcohol importation and transportation system, is problematic. *North Dakota v. United States*, 495 U.S. at 431 (States have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system.") *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-515 (1996) (Section 2 delegated to the States the power "to prohibit commerce in" alcoholic beverages and further said that State "regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause'" citing *Ziffrin, supra*).

II. Respondents distort the plain language of the Webb-Kenyon Act and incorrectly infer the importation of a "non discrimination" provision from the earlier Wilson Act.

Respondents assert, Resp. Br., 22-25, 32-35, that like the Wilson Act, the Webb-Kenyon Act evidences a Congressional intent that out-of–State shipments of alcoholic beverages may not be treated differently than in-State shipments. That contention is simply wrong, as can be seen from a comparison of the words of the two Acts and the history that resulted in the need for Webb-Kenyon.

The Wilson Act, 27 U.S.C. § 121, was enacted in 1890 and provides, in part:

> All . . . intoxicating liquors . . . transported into any State . . . *shall upon arrival* in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, *to the same extent and in the same manner as though such* . . . liquors had been produced in such State . . . . (emphasis added)

The Webb-Kenyon Act, 27 U.S.C. § 122, was enacted in 1913[8] and provides, in part:

> The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind form one State . . . into any other State . . . to be received . . . sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited.

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[8] The Webb-Kenyon Act was re-enacted in 1935, after the repeal of Prohibition by the 21st Amendment. The Wilson Act was not re-enacted.

Comparison of the two Acts plainly shows that the Webb-Kenyon Act does not contain the qualifying language set forth in the Wilson Act that imported alcoholic beverages had to be treated in the same "manner as though such liquids or liquors had been produced in such State." Webb-Kenyon actually gave States the right to regulate imported alcoholic beverages in a manner that would not have been permitted under the Wilson Act. A review of the jurisprudence that led to these two statutes confirms that Congressional intent.

Following this Court's decision in *Leisy*,[9] when Congress attempted to free State regulation of alcoholic beverages from the limitations imposed by *Bowman*[10] and *Leisy*, it was initially concerned that States not use their newly liberated power to enact discriminatory legislation. Thus, the Wilson Act, by its explicit terms, did not permit different treatment of alcoholic beverages originating out-of-State since it only removed dormant Commerce Clause protection from shipments of alcoholic beverages upon arrival in the State.

Later in *Scott v. Donald*, 165 U.S. 58 (1897), the Court invalidated South Carolina legislation limiting the permitted mark-up in State dispensaries of in-State wine while not so limiting the mark-up of California wine and prohibiting the direct importation of wine to consumers. The only objection to the challenged legislation was that it violated the dormant Commerce Clause. "We cheerfully concede that the law in question was passed in the bona fide exercise of the police power." *Id.* at 91. The otherwise valid legislation, enacted

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[9] *Leisy v. Hardin*, 135 U.S. 100 (1890)(could not regulate the importation or resale of alcohol as long as the alcohol remained in its original package).

[10] *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888)(could not restrict the importation of liquor to persons possessing a permit).

under the police power, was not saved from dormant Commerce Clause challenge by the Wilson Act because it neither banned the manufacture and sale of intoxicating liquors within the State nor did it apply uniformly to in-State and out-of-State products, as the Wilson Act required. *Id.* at 100.

The next year in *Vance v. Vandercook*, 170 U.S. 438 (1898), the Court was confronted with a challenge to a revised South Carolina dispensary law without the discriminatory mark-up provisions and with a limitation rather than a prohibition of the right to receive out-of-State shipments of alcoholic beverages for use but not for sale. Quoting at length from *Scott*, the Court rejected the claim that the dispensary law was discriminatory. The Wilson Act had been interpreted in *Rhodes v. Iowa*, 170 U.S. 412 (1898) as not applying until shipments were received by the consignee, so the limitation on direct receipt was ruled unconstitutional under the dormant Commerce Clause. *Vance*, 170 U.S. at 451-452.

The Wilson Act still left the States unable to regulate alcoholic beverages effectively, since their policies could be legally frustrated by shipments from out-of-State. In *Dugan v. Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936) the distinction between the Wilson and Webb-Kenyon Acts is well recognized. There a three-judge court, in rejecting a Commerce Clause and Fourteenth Amendment challenge to a New Hampshire law conditioning importation of alcoholic beverages to in-State wholesalers upon the manufacturer's receipt of a certificate of approval, wrote of the Webb-Kenyon Act:

> This act in its original form contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state products . . . . [citation omitted] In the act as finally passed, the restrictive language does not appear. Its omission seems important. It shows an intent to give the states

> an entirely free hand in regulating the importation and transportation of liquor. *Id.* at 704.
>
> The Court then observed:
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> There appears to be no prohibition in the act against discrimination between liquors produced within the state and those produced outside the state. *Id.*

The Webb-Kenyon Act was passed only after President Taft first vetoed it on constitutional grounds. See 49 Cong. Rec. 4291-4292, 4299, 4447 (1913). President Taft had vetoed the Act, criticizing it for permitting "the states to exercise their old authority, before they became states, [*i.e.* before ratification of the Constitution] to interfere with commerce between them and their neighbors." See 49 Cong. Rec. 4292. The Webb-Kenyon Act was intended to and did permit effective State regulation. It did so in a way that protected from dormant Commerce Clause challenge legislation that might be criticized as 'discriminatory.'[11]

III. Michigan's regulations are necessary for effective alcohol regulation.

A. Effective alcohol regulation requires drawing distinctions.

Respondents object to Michigan's alcoholic beverage regulatory scheme because they claim it makes a "discriminatory" distinction between out-of-State and in-State

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[11] In *Clark Distilling Co. v. Western M. R. Co.*, 242 U.S. 311, 325 (1917) this Court held that the "[Webb-Kenyon] act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

wineries. However, Michigan rationally decided that effective alcoholic beverage regulation requires this distinction is necessary.[12]

The 21st Amendment and the Webb-Kenyon Act authorize Michigan to channel out-of-State shipments of alcohol to licensed wholesalers in order to achieve regulatory control through a transparent and accountable distribution system. For regulatory control out-of-State shipments are simply not the same as in-State ones.[13] Michigan has rationally determined that it cannot effectively track out-of-State direct shipments to prevent illegal alcohol sales, collect taxes, or take meaningful enforcement action (*i.e.* it cannot effectively close out-of-State businesses that violate its laws). Michigan does not discriminate against out-of-State wines. The Michigan market is open to out-of-State wines and for the most part (like most other States) its wine retail market consists of imported wines.[14] Michigan's regulatory distinctions between out-of-State shipment directly to Michigan residents and in-State

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[12] For example, Michigan's Liquor Code (like every other State) makes many different kinds of distinctions in or between classes of licenses that permit sales and consumption of alcohol. MCL 436.1107(2)-(11). Also see MCL 436.1503(1)(location of alcohol retail licensee must be 500 feet from church or school building); Mich Admin Code r 436.1133 (retail hard liquor business can't be within one half mile of another); MCL 436.1541, Mich Admin Code r 436.1129(3)(a); 436.1135(3)(a) (Restrictions on retailers with gas pumps); Mich Admin Code r 436.1311 (Prohibiting advertising referencing minors); MCL 436.1916 (Restricting Entertainment).

[13] Unlawful discrimination exists only when a State discriminates among similarly situated in-State and out-of-State interests. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-126 (1978). See also, *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2nd Cir. 2003).

[14] See http://www.wineinstitute.org/communications/statistics/Sales_03.htm.

shipment to Michigan residents merely reflects the fact that the out-of-State direct shipment operates outside of Michigan's strict regulatory system and the in-State shipment does not.

All states regulate alcoholic beverages more extensively than they do most other products. All states make distinctions among alcoholic beverages when regulating their distribution, sale, or use. The traffic, type of shipment, or use made of one intoxicant may be more harmful to the public peace and health than another. The question whether one intoxicant or its shipment is more harmful, requiring greater restraint, is a question that depends upon a variety of circumstances subject to the exercise of judgment and discretion on the part of each State's Legislature and Liquor Control Commission. In this regard, the 21st Amendment and the Webb-Kenyon Act grant broad authority to the States to regulate the transportation and importation of alcohol. The States' regulatory classifications are not subject to strict scrutiny. This is not to say that the 21st Amendment or the Webb-Kenyon Act empower a State to act with "total irrationality or invidious discrimination" in controlling the distribution and shipment of alcohol. See *Craig*, 429 U.S. at 212-14 (Stewart, J., concurring).[15] Since Michigan's laws regulating the importation, distribution and sale of alcoholic beverages are neither irrational nor invidious, they are constitutionally protected.

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[15] See also, *Mahoney*, 304 U.S. at 403; *Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (D.C. 1996), *cert. den.* 520 U.S. 1186 (1997) (D.C. law that generally forbids alcoholic beverage licensees from storing beverages outside the District upheld as valid under the 21st Amendment); *Felix v. Milliken*, 463 F. Supp. 1360 (E.D. Mich. 1978)(Equal Protection challenge to Michigan's law raising the legal drinking age to 21 upheld); and *Inturri v. Healy*, 426 F. Supp. 543 (D. Conn. 1977)(distinctions in alcohol regulation between dinner theatres, lounges, and cafes are valid).

Although they focus on wine, Respondents' argument boils down to the proposition that under the dormant Commerce Clause, any privilege that Michigan grants to an in-State alcohol beverage licensee must also be granted to an out-of-State entity engaged in the same general profession (e.g., wine maker, retailer, wholesaler, brewpubs). Respondents assert that since Michigan allows in-State wine makers to ship their products directly to Michigan consumers, it must also let out-of-State wine makers ship directly to Michigan residents. Taken to its logical conclusion, that would require that since Michigan allows certain other licensed in-State retailers operating within the three-tier system to directly ship alcoholic beverages to Michigan residents, then any of the hundreds of thousands of out-of-State retailers in alcoholic beverages should also be able to directly ship alcoholic beverages to Michigan residents. This would turn Michigan's and other States' systems upside down. In addition, such a decision could perversely result in the kind of reverse discrimination resembling "that created by *Bowman, Leisy, Rhodes, Vance,* and the original package doctrine a century ago, when States discriminated against in-State sellers, because they could not effectively govern direct shipments from elsewhere." *Bridenbaugh,* 227 F.3d at 854.

The bottom line is that Respondents' goal could lead to a market in alcoholic beverages over which States will have lost effective control. Accordingly, under their theory many States' importation and distribution regulations would be invalid under the Commerce Clause despite the 21st Amendment.[16] For

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[16] Respondents and some of the Amici point to Michigan's Out of State Seller of Wine license (OSSW) as evidence of discrimination or economic protectionism. However, they misunderstand how an OSSW license works and inappropriately compare it to a small Michigan wine maker license fee. An OSSW license is more akin to a license to act as an agent for the out-of-State sale of wine through Michigan's three-tier system. Mich. Admin. Code r. 436.1705, C.A. App. 315-317 (Wendt Aff'd.). A small out-of-State

instance, under Respondents' theory of the law, the reciprocal shipping States they and other *Amici* refer to in their briefs could be struck down under the dormant Commerce Clause since those reciprocal laws discriminate against wineries in States that do not allow direct shipping. See Calif., *et al.*, Amici Br., 1. Even the proposed Model Shipping legislation cited by Respondents would not be impervious to Commerce Clause attack.

B. Federal enforcement laws are no substitute for State regulation and the 21st Amendment Enforcement Act does not evidence Congress's intent not to allow States to regulate out-of-State shipments.

Respondents and other *Amici* suggest that Michigan can rely upon the 21st Amendment Enforcement Act, 27 U.S.C. § 122a(b) (2004), and the power of the United States Tax and Trade Bureau (TTB)[17] to pull federal permits under 27 U.S.C. § 203 (2004), to enforce compliance with its shipment laws. Resp. Br., 46-47, Mem. of Cong. Amici Br., 1, 28-29. This argument is meritless.

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winery wishing to sell its wine is not required to pay the $300 license fee. It only needs to find one of many OSSW licensees. *Id.* The $25 in-State wine maker fee does not account for all of the additional regulatory costs and local permit costs associated with operating this highly regulated business in Michigan. MCL 436.1537(3). In addition to other requirements, payment of an additional $100 fee must be paid by the small Michigan wine maker for sales and wine tasting at each off-premise location. To sell other beer and wine products, Michigan wine makers must pay an additional $100 license fee. MCL 436.1525(j).

[17] The United States Tax and Trade Bureau was formerly known as the Bureau of Alcohol, Tobacco, and Firearms.

First, as New York and the *Amici* States point out[18], the 21st Amendment Enforcement Act provides for injunctive relief only. Second, when Michigan attempts enforcement action against illegal out-of-State shippers, jurisdictional defenses are raised which are difficult if not impossible to overcome. For instance, when Michigan attempted enforcement efforts against out-of-State manufactures and retailers such as the Great American Beer Club, California Wine Club, the Wine Exchange, Best Buy Wine Club, Pop's Wine and Spirits, and Connoisseur Imports they all claimed Michigan lacked jurisdiction and asserted that *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) prevented the collection of taxes and that the 21st Amendment is no exception.[19] It is no wonder Respondents gloss over *Quill* and suggest that licensing out-of-State shippers would resolve the tax collection problem. Resp. Br., 41, n. 17. However, what constitutional licensing scheme a State chooses to adopt for the out-of-State shipments of alcohol imported into its territory is a legislative choice reserved to the States by the 10th and 21st Amendments.

The suggestion that the TTB will pull an illegal shipper's permit is open to question. TTB, not the State, makes the decision on whether to take action based on whether "there is a continuing, material, adverse impact upon a State through the actions of a basic permittee located outside the boundaries of the affected State" and the "extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."[20] "Retailers are not

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18 No. 03-1274, NY Resp. Br., 34, n. 9.

19 C.A. App. 328-355. Also See Amicus Br. of Ohio, *et al.* at 25, No. 03-1274, NY Resp. Br., 34-35.

20 ATF Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997) cited in the Br. of Resp., at 46, was modified by a TTB ruling found at: http://www.atf.gov/pub/qtrly_bulletins/ vol2_qb 2000/rulings.pdf.

required to obtain basic permits under the (FAA Act)," Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.* *Id.* TTB has also made it clear on its Internet site that for the most part it leaves the regulation up to the States.[21]

Certain *Amici* Congressmen, mainly from the State of California, claim that the 21st Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, somehow reaffirmed that States were not delegated the authority to regulate out-of-State shipments. *Mem. Cong. Amici Br.*, 1-3, 19-21. The fallacy of this argument, of course, is that the Act itself does nothing more than provide an injunctive enforcement method the States can employ against illegal shippers provided they are engaged in a "valid exercise of power" under the 21st Amendment as interpreted by the Supreme Court in conjunction with other provisions of the Constitution. 27 U.S.C. § 122a (e)(1). The statute does not specify what constitutes the 21st Amendment power of the States, it does not specifically exclude States that ban direct shipping from its benefits, and it does not conclude that Michigan law is unconstitutional. That issue is presently before this Court and the 21st Amendment Enforcement Act is not.[22]

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[21] At: http://www.atf.gov/alcohol/info/faq/genalcohol.htm#g5

[22] The Cargo Airline Association Amici assert that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 108 Stat. 1569, 1605-1607, preempts Michigan's shipment laws pertaining to distribution of alcohol, specifically, MCL 436.1203(1). Cargo Airline Amici Br., 6-24. This assertion, well outside of the terms of the grant of certiorari, Sup. Ct. R. 14.1(a), is untenable. The 21st Amendment protects State importation controls even if Congress should repeal the Webb-Kenyon Act and declare free trade in alcoholic beverages. That is why section 2 was placed in the 21st Amendment. Congress may not evade the Constitution indirectly by deregulating the means by which alcoholic beverages are imported. That argument would prohibit importation controls even for "bone-dry" States, which prohibit the manufacture, sale, and importation of alcoholic beverages.

Michigan categorically rejects Respondents' assertion that the regulatory concerns of the State with respect to out-of-State direct shipments are unfounded. Respondents go so far as to claim that there is no evidence that minors are buying, or would buy, wine or liquor from out-of-State shippers. This is simply wrong.[23] An example of the severity of the problem is shown in recent press reports from the State of Washington. There "a bunch of Gonzaga University students . . . ordered liquor, beer and wine 'on-line' and had it delivered to their door steps without ever being questioned about their age."[24] A demand was made to the Washington State Attorney General to take action against Internet retailers. Similarly, in June of this year, the Massachusetts Attorney General "filed a lawsuit against four Internet retailers from four different States for selling alcohol to minors." *Id.*[25]

C. The staff Federal Trade Commission (FTC) report cited by Respondents is neither credible nor persuasive.

The staff Federal Trade Commission (FTC) report, cited by Respondents and their *Amici*, claiming that States that allow

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[23] C.A. App. 92-93 (Stewart Interrog. 2). (In one year 3624 controlled buy operations with underage decoys were conducted and 29% of those retailers made attempted sales to the undercover (decoy) minors.) C.A. App. 322-324 (Smith Aff'd.), 325-327 (Mead Aff'd.), 356-360, 448-472. Respondents' assertion that the State does not do inspections is also wrong. (2507 investigations conducted of licensees approving adequate physical plant, building code and sales compliance, and many other factors which of necessity encompass frequent inspections.) C.A. App. 322-324. Also see D.C. R 54, Ex 11, Attach C, (showing enforcement actions against Michigan Wine Makers and Brew Pubs).

[24] At: http://seattlepi.nwsource.com/local/185415_liquor09.html. (Seattle Post-Intelligencer (8/9/04)). For other examples, see Michigan Assoc. of Sec. Sch. Prin., et al., Amici Br., 10-22.

[25] Obtaining jurisdiction over out-of-State entities shipping alcohol is a nightmare. See Pet. Br., 33, n. 24.

out-of-State direct shipments are not experiencing problems, is neither credible nor persuasive.[26] The report is not based upon any independent research studies or findings. It is mainly based on ten States' responses to a questionnaire sent out by the staff of the FTC. Eight of those States had not even conducted investigations on the issue. *FTC Report* at 31-33. The report did note "that Michigan found that '[a]bout one in three websites contacted' (roughly 33%) agreed to sell alcohol to the minor with no more age verification than a mouse click, and that UPS delivery people did not properly verify the recipients' ages." It also noted that other States found that minors can buy wine online. *Id.* at 35. It does not focus on the merits of the tax debate and it relies on a self-serving statement by the Wine Institute (a trade association of pro-direct shipment interests) that its members will comply with the law and pay taxes. *Id.* at 39-40.

IV. Effectuation of the plain language of the 21st Amendment as an exception to the Commence Clause does not undermine other valid Commerce Clause applications.

A. Bacchus is distinguishable and is not controlling.

As shown in Pet. Br., 27-29, *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984), is distinguishable on its facts and, therefore, not controlling. Michigan (like its *Amici* States) respectfully suggests that *Bacchus* was erroneously decided or that it should be limited to its facts, *i.e.*, where a State explicitly disavows any regulatory purpose in alcoholic beverage laws.

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26 FTC, Staff Report, 7/3/03, at: http://www.ftc.gov/os/2003/07/winereport2.pdf. Compare Amicus brief for Ohio, et al, p. 26, describing State concerns and problems.

Respondents' statement that, "Not a single opinion by any Justice has called *Bacchus* into question," is simply incorrect. Resp. Br., 29. See, e.g., *City of Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., specifically referenced *Bacchus* in his dissent with whom Brennan, J., joined, when he said in no uncertain terms that the Court has completely distorted the 21st Amendment); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352-360 (1986) (O'Connor, J., dissenting, joined by Rehnquist, C.J., called *Bacchus* into serious question); and *James B. Distilling Co. v. Georgia*, 501 U.S. 529, 557 (1991) (O'Connor, J., with whom Rehnquist, C.J., and Kennedy, J., joined, stating that "The court's conclusion in *Bacchus* was unprecedented.")

Justice Stevens, dissenting in *Bacchus*, correctly noted that the majority adopted a "totally novel approach to the Twenty-first Amendment." *Bacchus*, 468 U.S. at 286-287 (Stevens, J., dissenting). The proper question then and now "is not one of 'deference,' nor one of 'central purposes'; the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is." *Id.* at 287. Clearly, Michigan's out-of-State direct shipment ban falls "squarely within the protection given to" it by the 21st Amendment, "which expressly mentions 'delivery or use therein.'" *Id.* at 280.

Revisiting *Bacchus* would not require reconsideration of any other decision of this Court. It would prevent lower courts from misreading that decision as a general warrant to strike down State regulation of the importation, distribution, and sale of alcoholic beverages because some other State has chosen to live with less effective regulation or because the challenged law does not comport with some other conception of reasonableness.

B. The 21st Amendment creates an exception for alcoholic beverages from traditional Commerce Clause considerations.

The late nineteenth century saw the development of an "unedifying history" (*Carter v. Virginia,* 321 U.S. 131, 142, J. Frankfurter, concurring [1944]) of a body of case law that applied a rigid formulation of the dormant Commerce Clause, frustrating State efforts to establish effective alcoholic beverage importation regulations. That analysis treated alcoholic beverages the same as other items of commerce, like cheese, for purposes of Commerce Clause analysis even as it held that the police power of the State otherwise permitted much more extensive regulation of alcoholic beverages than of almost all other products. Congress recognized that alcohol is not like cheese, however, and soon made changes to effectuate the distinctions. The Wilson Act, and subsequently the Webb-Kenyon Act and the 21st Amendment, were each efforts, along different lines, to undue that nineteenth century jurisprudence. Each of those enactments gave States progressively greater control over the importation of alcoholic beverages.

Affirming Michigan's constitutional authority to enforce effectively its regulatory system for the importation, distribution, and sale of alcoholic beverages under the 21st Amendment has no necessary implications for dormant Commerce Clause analysis in general. Citations to Commerce Clause opinions of this Court and quotations from Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525 (1949) are irrelevant. See NBWA Amicus Br., 8 n. 5. In *Duckworth v. Arkansas*, 314 U.S. 390, 397-402 (1941), Jackson, J., concurred in the result, asserting that failure to uphold State laws by reference to the 21st Amendment, instead holding them reasonable under the dormant Commerce Clause, weakened both the 21st Amendment and the dormant Commerce Clause. To him, affirming State alcoholic beverage law by reference to the 21st Amendment was consistent with a

strong dormant Commerce Clause. The 21st Amendment authorizes a constitutional regime for alcoholic beverages that is distinct from that for other products. The Webb-Kenyon Act and the 21st Amendment were clearly efforts to overcome Commerce Clause constraints on the States that this Court had found in its pre-Webb-Kenyon jurisprudence.

Respondents quote James Madison for the principle of a strong economic union but Madison also wrote "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961). The Respondents are asking this Court to rewrite the 21st Amendment and Webb-Kenyon Act by blue-penciling out powers that have been explicitly given to the States. This Court should decline the invitation.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

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IN THE

Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

REPLY BRIEF FOR PETITIONER

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The Michigan plaintiffs (respondents in No. 03-1120) concede that (i) States have unique interests in regulating the distribution of beverage alcohol to their citizens (Br. 10, 22, 43); (ii) States cannot effectively regulate such distribution unless they can control the flow of beverage alcohol across their borders (Br. 22); and (iii) the Twenty-first Amendment and the Webb-Kenyon Act were therefore adopted and worded to carve an exception to the dormant Commerce Clause (Br. 21).

Plaintiffs argue that the constitutionally authorized barrier against unlicensed imports that Michigan (like most other States) has had in place since Prohibition comes tumbling down because the State gives one class of state licensees, who are physically located in the State and subject to its life-or-death regulation, a privilege of shipping directly to customers that is not extended to unlicensed out-of-state entities. Their argument is that the difference in regulation is "discrimination" that eliminates Twenty-first Amendment protection and subjects Michigan's law to "strict scrutiny" to see whether the interests of Michigan and its residents would be just as well protected by a less restrictive approach than the Legislature has chosen.

But there is no constitutional principle that States must treat out-of-state and in-state suppliers of beverage alcohol identically or equally, nor (with respect to this product) is there a national preference for open competition, minimal regulation, maximal availability, and low prices. The Twenty-first Amendment and Webb-Kenyon protect the States' broad discretion over the distribution of alcohol to their residents, by giving the States "virtually plenary" control over physical importation. Nothing in their language or history or in this Court's cases suggests that state control over importation is to be limited by the way a State regulates purely in-state distribution activities. All that the Constitution requires is that state regulation of the importation or transportation of beverage alcohol, including any distinctions the State chooses to draw, be rational (as congressional regulation of other parts of commerce must be) and

not violate other provisions of the Constitution that the Twenty-first Amendment was not intended to affect.

Even if it were the responsibility of the courts, rather than the Michigan Legislature, to determine what regulatory system works best in Michigan, plaintiffs have not shown how a State can effectively enforce its restrictions on the distribution of alcoholic beverages and collect its tax revenues if it must permit direct shipment by out-of-state entities. A court-imposed permit system licensing an unbounded number of out-of-state sellers would overwhelm Michigan regulators and leave them without their most effective tool: the ability to put violators out of business. The federal enforcement mechanisms that plaintiffs cite are weak substitutes, and forcing Michigan to rely on them is inconsistent with the basic allocation of responsibility that the Twenty-first Amendment established.

If Michigan cannot draw rational distinctions between out-of-state and in-state suppliers of alcoholic beverages, there is no obvious reason why it would not be required to allow any out-of-state wholesaler to ship wine, beer, and spirits to in-state retailers, and to allow any out-of-state retailer to ship wine, beer, and spirits directly to consumers. That would largely mean the end of the three-tier system of regulation that this Court has called "unquestionably legitimate." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion of Stevens, J.); *see also id.* at 447 (Scalia, J., concurring in judgment). This case is not about "fine and rare wines" but about the viability of the entire system of alcohol regulation that the States have relied upon for 70 years.

I. WEBB-KENYON AND THE TWENTY-FIRST AMENDMENT NEITHER INCORPORATE NOR PERMIT ANY REQUIREMENT THAT STATES TREAT OUT-OF-STATE AND IN-STATE SUPPLIERS IDENTICALLY.

Webb-Kenyon and the Twenty-first Amendment grant the States authority to regulate the "transportation or importation" of beverage alcohol. Neither the texts of these provisions nor their historical background authorize the im-

position of a requirement that States either treat out-of-state suppliers identically with in-state licensees or face strict judicial scrutiny.

1. Plaintiffs argue that Webb-Kenyon and, by implication, the Twenty-first Amendment "only prohibit[] shipments into dry areas" (Br. 10), and that they therefore "cannot be read" to displace the dormant Commerce Clause in States (such as Michigan) that regulate, but do not bar, the distribution of alcohol (Br. 10, 34; *see also* Br. 21, 23-25 & n.9). That argument rests on misreading *Seaboard Air Line Railway* v. *North Carolina*, 245 U.S. 298 (1917). The passage plaintiffs cite is the Court's summary of the respondent's position in that case. *See id.* at 303. On the next page, the Court rejects that position, and the actual holding of *Seaboard* is the opposite of what plaintiffs claim: "[I]nstead of interposing an absolute bar against all . . . shipments [of imported alcohol], as it was within the power of the state to do," North Carolina had the authority under Webb-Kenyon to "permit[] them upon conditions . . . . The greater power includes the less." *Id.* at 304.[1]

Representative Webb made this clear at the adoption of Webb-Kenyon in 1913. It "applies to all States, 'wet' and 'dry' alike, because every State in the Union has laws against the unrestricted sale of liquor, and this bill would protect the 'wet' States whose laws are to be violated in the use or sale of liquor as well as it would protect the 'dry' States under the same circumstances. It is a State rights measure." 49 Cong. Rec. 2,812 (1913). The later adoption of nearly identical language in the Twenty-first Amendment in

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[1] Other pre-Twenty-first Amendment cases are consistent. *See Rainier Brewing Co.* v. *Great N. Pac. S.S. Co.*, 259 U.S. 150, 154 (1922) (interpreting Webb-Kenyon to authorize State to limit quantity of alcohol that citizens could import and manner in which it could be shipped); *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.S. 311, 324 (1917) (Webb-Kenyon Act "operated . . . irrespective of whether the state law did or did not prohibit the individual use of liquor."); *cf. Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 447 (1898) (Wilson Act).

1933, and the re-enactment of Webb-Kenyon in 1935, ratified the Court's interpretation of Webb-Kenyon in *Seaboard*.[2]

2. The texts of the Twenty-first Amendment and Webb Kenyon broadly prohibit exactly what plaintiffs seek to do here, without any suggestion that state laws must treat out-of-state suppliers identically or equally with in-state licensees. *See* MB&WWA Br. 15. Plaintiffs nevertheless argue (Br. 20-25) that these provisions were adopted only to reverse the "*Bowman/Rhodes* line of cases and did not affect the rule against discrimination" plaintiffs say was established in cases such as *Tiernan* v. *Rinker*, 102 U.S. 123 (1880), and *Walling* v. *Michigan*, 116 U.S. 446 (1886), and that there is no legislative history specifically approving state laws treating out-of-state and in-state entities differently.

But, first, there would be no warrant for limiting the protection clearly granted by the Amendment and Webb-Kenyon because of supposed silence in their legislative histories. As the Court demonstrated in interpreting the Amendment itself shortly after adoption (*see infra* pp. 7-9), "where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup* v. *Timm*, 502 U.S. 410, 419-420 (1992); *see also Hibbs* v. *Winn*, 124 S. Ct. 2276, 2300 (2004).

Second, the legislative history is *not* silent. An initial draft of Webb-Kenyon included nondiscrimination language, but Congress, on clear notice that States might discriminate between in-state and out-of-state suppliers, chose not to include that language in either Webb-Kenyon or the Twenty-

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[2] Plaintiffs also cite several statements in the legislative history as establishing that "[t]he core concern of the legislative drafters of . . . the Twenty-First Amendment" was to ensure that dry States could remain dry after Repeal. Br. 25 n.9. But while this was obviously an objective, it was hardly the only one. The statements cited by plaintiffs are perfectly compatible with the many statements showing that Congress intended to protect state rights more broadly. *See* MB&WWA Br. 21-22.

first Amendment. *See* MB&WWA Br. 24.[3] In historical context, this choice must be read as intentional—and it was so read at the time in a judicial decision that MB&WWA cited but that plaintiffs fail to address. *See Dugan* v. *Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936). As Senator Blaine put it during the deliberations, the Amendment gave States "*absolute control in effect* over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4,143 (1933) (emphasis added).[4]

Third, *Bowman* v. *Chicago Northwestern Railway*, 125 U.S. 465 (1888), *Rhodes*, *supra*, *Tiernan*, *supra*, and *Walling*, *supra*, all rested on the *same* principle—that importation of alcohol was interstate commerce with which States could not interfere. *See Walling*, 116 U.S. at 461; *Tiernan*, 102 U.S. at 127. Indeed, the Court stated in *Bowman* that "[t]he present case is concluded, we think, by the judgment of this Court in *Walling*," 125 U.S. at 495, and the Court expressly rejected any attempt to distinguish *Walling* on the grounds that the statute there "made a discrimination" in favor of in-state citizens, *id.* at 496. Rather, the operative principle in both cases was that "[i]nterstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce . . . ." *Id.* (quoting

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[3] *Amici* DKT Liberty Project (DKT) and Napa Valley Vintners (NVV) attempt to dismiss the Senate's deletion of the nondiscrimination language as merely a procedural maneuver in order to conform the Senate version of the bill to the House version. *See* DKT Br. 17-18 n.5; NVV Br. 17. At best, that does not answer why the House bill omitted that language in the first place.

[4] *Amicus* NVV misreads (NVV Br. 16-17) the statement by Senator Stone that the Webb-Kenyon Act would "put the shipper outside of [a State] upon a level . . . with the shipper within the State." 49 Cong. Rec. 2,917 (1913). In context, Senator Stone was merely explaining that Webb-Kenyon would remedy a perverse consequence of the Wilson Act, namely that out-of-state manufacturers could ship to in-state customers while in-state shippers could not. *See generally Rhodes* v. *Iowa*, 170 U.S. 412 (1898). Senator Stone later clarified that Webb-Kenyon was designed to "enable the State to enforce its own internal policy" and "[h]ow [the liquor traffic] shall be regulated is a question each State should answer for itself . . . ." 49 Cong. Rec. 2,917 (1913).

Robbins v. *Shelby County Taxing Dist.*, 120 U.S. 489, 497 (1887)). When Webb-Kenyon and the Twenty-first Amendment rejected that principle, they overturned all four cases, destroying the foundation of *Tiernan* and *Walling* as well as that of *Bowman* and *Rhodes*.[5]

Fourth, and most important, the Twenty-first Amendment and Webb-Kenyon are themselves inherently "discriminatory" in the sense plaintiffs mean, because they focus on "importation" to enable States to deal with the inherent difference between out-of-state suppliers and in-state licensees. *See Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Out-of-state suppliers are not effectively subject to the full range of state regulation, so Michigan and other States have chosen to require that when they sell for in-state consumption, they do so through another firm that is. This treatment of out-of-state producers as a distinct class follows naturally from the States' constitutional and statutory authority to regulate "importation."

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[5] As the Court noted in *Clark Distilling*, Webb-Kenyon's official title was "An Act divesting intoxicating liquors of their interstate character in certain cases," 242 U.S. at 321, and the statute was enacted to "prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws," *id.* at 324. If imported alcohol is divested of its "interstate character" and stripped of the "immunity characteristic" ordinarily accorded by the Constitution, it must be treated, for constitutional purposes, as *intra*state commerce—*i.e.*, subject to the plenary regulatory power of the State, which is subject to constitutional challenge only to the same very limited extent as other state internal economic regulation.

Amicus DKT asserts that "discriminatory laws are not proper or bona fide police laws in the first place" (DKT Br. 15), but it cites no source for any such free-floating restriction on state legislative power. The cases that DKT does cite are cases in which the police power was limited *by the dormant Commerce Clause*. *See, e.g., Vance*, 170 U.S. at 455; *Scott* v. *Donald*, 165 U.S. 58, 91 (1897) ("We cheerfully concede that the [discriminatory] law in question was passed in the bona fide exercise of the police power," but that statute still may be "repugnant to the constitution of the United States"); *Walling*, 116 U.S. at 455. Since the Amendment rendered that doctrine inapplicable to restrictions on alcohol importation, the States' police power is not subject to any other limitation.

3. Finally, plaintiffs' argument (Br. 19-20) that this Court should read a nondiscrimination clause into the Twenty-first Amendment, because it has previously read exceptions into the Amendment to protect personal constitutional rights and Congress's authority to enact legislation, misses the point. None of the constitutional provisions or federal laws at issue in those cases played any role in the adoption of Webb-Kenyon and the Twenty-first Amendment. The purpose of Webb-Kenyon and the Twenty-first Amendment, as plaintiffs concede (Br. 21), was to exempt States from the dormant Commerce Clause. At least after the Twenty-first Amendment, there is no constitutional right to have beverage alcohol as widely and cheaply available as possible, or to sell into a State on the same terms as an in-state licensee.[6]

II. THIS COURT'S CASES REFUTE PLAINTIFFS' CONTENTION THAT ANY STATE STATUTE THAT DRAWS A DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE ALCOHOL SUPPLIERS IS SUBJECT TO STRICT SCRUTINY.

This Court's cases have consistently interpreted the Twenty-first Amendment to allow States to draw rational distinctions between in-state and out-of-state suppliers of alcoholic beverages. In adopting the Twenty-first Amendment, the Nation gave each *State* the authority to regulate one small portion of interstate commerce—the "transportation or importation" of alcohol into the State "for delivery or use therein"—and nothing in this Court's case law suggests

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[6] The Privileges and Immunities Clause argument raised by *amicus* Virginia Wineries Association is not properly before the Court: it was never raised by the Michigan plaintiffs and was excluded from the grant of certiorari in the New York case. For a similar reason, the argument of *amicus* Cargo Airline Association ("CAA") that § 601 of the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), preempts Michigan's alcohol regulations should be rejected. *See* CAA Br. 12. This argument—which goes far beyond plaintiffs' discrimination argument and would condemn virtually all state laws governing alcohol importation—has never previously been raised in this case or in any of the direct-shipment litigation nationwide.

that a State's exercise of that authority is subject to greater judicial scrutiny than Congress itself receives when it legislates pursuant to the Commerce Clause.

Plaintiffs misdescribe this Court's first case interpreting the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), which established that States may discriminate against out-of-state alcohol. Contrary to plaintiffs' suggestion (Br. 26), the Court's opinion expressly recognized that the California law at issue (which the Court upheld) discriminated against out-of-state alcohol. California imposed a $500 license fee for the privilege of importing alcohol, and the Court noted that the State did not "exact[] an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business."[7] Indeed, the California law was essentially the same as the laws struck down in *Tiernan* and *Walling*.[8] *Young's Market* upheld the California statute and thus effectively overruled *Tiernan* and *Walling*, because of the intervening adoption of the Twenty-first Amendment.

The Court's statement in *Young's Market* that the case did "not present a question of discrimination prohibited by the commerce clause," 299 U.S. at 62, read in context, did not mean that there was *no* discrimination, but rather that the statute's problems under the Commerce Clause went well beyond discrimination: the statute directly regulated interstate commerce by taxing importation and, under the *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872), *that* problem could not be remedied simply by equally burdening in-state beer. *See Young's Market*, 299 U.S. at 62. The Court, however, held that the Twenty-first Amendment eliminated *all* dormant Commerce Clause objections to stat-

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[7] The $750 fee cited by plaintiffs (Br. 26 n.10) applied to *manufacturers* of beer and was not analogous to the $500 fee imposed on *wholesalers* that imported out-of-state beer. *See Young's Market*, 299 U.S. at 64.

[8] *See Walling*, 116 U.S. at 454 (striking down $300 Michigan tax on persons selling alcohol imported from out-of-state); *Tiernan*, 102 U.S. at 127 (striking down $200 Texas tax on persons selling beer and wine manufactured out-of-state).

utes regulating alcohol importation. Indeed, the Court specifically rejected the contention that the Twenty-first Amendment gave States authority over importation yet prohibited discrimination: "To say that, would involve not a construction of the Amendment, but a rewriting of it." *Id.* at 62.

The Court's subsequent cases did not (as plaintiffs claim) merely "characterize *Young's Market* as affirmatively holding that 'discrimination against imported liquor is permissible.'" Br. 26. Both *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), and *Indianapolis Brewing Co.* v. *Liquor Control Commission of State of Michigan*, 305 U.S. 391 (1939), expressly *held* that the Twenty-first Amendment permits States to enact "clearly discriminat[ory]" laws. *Mahoney*, 304 U.S. at 403. Plaintiffs studiously avoid discussing the facts of these cases, and with good reason: *Mahoney* upheld a law that limited the importation of liquor stronger than 50 proof without limiting its in-state manufacture, 304 U.S. at 402-403, and *Indianapolis Brewing* upheld a statute that prohibited in-state dealers from selling any beer from Indiana or nine other States, 305 U.S. at 392. And there is absolutely no support for plaintiffs' assertion that the Court "characterized the law at issue [in *Indianapolis Brewing*] as nondiscriminatory." Br. 26 n.10. To the contrary, the Court upheld the law on the principle that "discrimination between domestic and imported intoxicating liquors . . . is not prohibited by the equal protection clause." 305 U.S. at 394.[9]

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[9] Plaintiffs highlight (Br. 13-14) the Court's opinion, written by Justice Jackson, in *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), which extolled the virtues of unrestricted interstate commerce, but nothing in that opinion contradicts the Court's contemporaneous view that alcohol was different. As then-Solicitor General Jackson stated in 1939, "[A]n exception was made to the generally exclusive power of Congress, and control of commerce between States in intoxicating liquors was handed back to the States of destination." Robert H. Jackson, *Trade Barriers—A Threat to National Unity*, in *Trade Barriers Among the States: The Proceedings of the National Conference on Interstate Trade Barriers* 75 (1939). Even legislation that discriminated to protect local interests, Jackson said, "is quite properly sustained by the Supreme Court." *Id.* at

Plaintiffs are equally wide of their mark in their interpretation of the Court's more recent decisions. Plaintiffs and *amici* repeatedly cite the Court's statement in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), that the Twenty-first Amendment did not repeal the Commerce Clause. Br. 21, 27. The Court was referring, however, to whether the Twenty-first Amendment repealed Congress's *affirmative* power under the Commerce Clause (something not at issue here). *See Hostetter*, 377 U.S. at 332 ("If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor."). The Court strongly reaffirmed that the Twenty-first Amendment immunized state laws against *dormant* Commerce Clause challenges. *See id.* at 330.

In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the Court struck down a discriminatory excise tax in Hawaii, but plaintiffs fail to explain the Court's basis for doing so. Neither Hawaii nor the Court could identify any justification for the difference in Hawaii's treatment of in-state and out-of-state alcohol other than protectionism. The tax, in other words, was "not supported by *any* clear concern of the Twenty-first Amendment," *id.* at 276 (emphasis added), and it thus failed rational-basis review. *Bacchus* never suggested that Hawaii's distinction between in-state and out-of-state alcohol triggered "strict scrutiny." Quite the opposite: the Court's actual holding was that state laws constituting "mere economic protectionism" are "not entitled to *the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.*" *Id.* (emphasis added). A state law that draws a distinction between in-state and out-of-state alcohol that is related to the concerns of the Twenty-first Amendment is entitled to deference.[10]

76; *see also Duckworth* v. *Arkansas*, 314 U.S. 390, 398-402 (1941) (Jackson, J., concurring in result).

[10] Plaintiffs also are wrong that Hawaii's excise tax was "obviously a regulation of the 'importation' of liquor into the State." Br. 29. The tax

Plaintiffs are also wrong to suggest (Br. 27) that *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), applied plaintiffs' "nondiscrimination" principle to strike down state alcohol regulations. *Brown-Forman* was not based on discrimination at all but on the fact that New York's regulation "directly regulate[d] interstate commerce." *Brown-Forman*, 476 U.S. at 582. In *Healy*, the Court found two Commerce Clause problems with the Connecticut price-affirmation statute: its extraterritorial "effect of controlling commercial activity occurring wholly outside the boundary of the State," *Healy*, 491 U.S. at 337, and its "discriminat[ion] against interstate commerce," *id.* at 340. The "discrimination," however, was not a distinction between in-state and out-of-state suppliers, and the Court did not cite *Bacchus*. It was an (apparently accidental) discrimination *among* entities that sold beer in Connecticut, penalizing those that also sold elsewhere (including in-state entities). *Id.* at 341. The ruling was consistent with the Court's theme that Connecticut could not project its regulatory regime into other States. Moreover, the Court held that the Connecticut statute fell outside the protection of the Twenty-first Amendment not because of the "discrimination" but only because of the extraterritorial effect. *See id.* at 342 ("Here, as in *Brown-Forman*, our finding of unconstitutional extraterritorial effects disposes of the Twenty-first Amendment issue.").[11] *Healy* thus leaves intact the Twenty-first Amendment's protection for a statute like Michigan's, which does *not* regulate liquor sales in other States.

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was imposed at wholesale, *after* liquor was imported, and was not an exercise of the core power to control physical importation.

[11] Justice Scalia, writing only for himself, stated that the statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment," 491 U.S. at 344, but as noted, the "discrimination" at issue was against firms that also did business out of state, not in favor of in-state suppliers.

Indeed, just one year after *Healy*, the Court in *North Dakota* upheld a state regulatory scheme that imposed special reporting and labeling requirements on alcohol importers and out-of-state distillers. *See* 495 U.S. at 428-429. Despite the facial distinction between in-state and out-of-state alcohol that North Dakota drew, the Court did not apply strict scrutiny. Instead, the Court upheld the labeling and reporting requirements because, in the words of the plurality opinion, they "f[e]ll within the core of the State's power under the Twenty-first Amendment," *id.* at 432, and they "unquestionably serve valid state interests," *id.* at 433.[12]

III. MICHIGAN'S DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE DIRECT SHIPMENT IS REASONABLY CALCULATED TO ACHIEVE LEGITIMATE STATE INTERESTS.

Plaintiffs attempt to draw the Court into the minutiae of alcohol regulation, arguing that other regulatory rules could protect Michigan as well as its current system, and that Michigan's regime therefore does not meet strict scrutiny. But strict scrutiny is not the standard. The proper standard of review is rational-basis scrutiny, and Michigan's regime easily passes that test. As explained below, the distinction that Michigan draws between in-state and out-of-state direct shipping is rationally related to the temperance and tax collection goals of the Twenty-first Amendment. Michigan's regime may not be the only way to way to achieve those goals, but under the Twenty-first Amendment, it is a constitutionally protected way.

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[12] Plaintiffs distort the Seventh Circuit's holding in *Bridenbaugh*. The Indiana statute was for present purposes indistinguishable from Michigan's. *See* 227 F.3d at 851 (Indiana permits "local wineries, but not [out-of-state] wineries . . . to ship directly" to consumers). The Seventh Circuit upheld the statute because there was no "functional discrimination," *id.* at 853, since the law simply "ma[d]e alcohol from every source equally amenable to state regulation," which "is precisely what § 2 [of the Twenty-first Amendment] is for," *id.* at 854.

A. Underage Drinking Is A Real Concern Posed By Direct Shipping.

Plaintiffs dismiss the concerns expressed by Michigan, the 33 other States that support Michigan, the National Conference of State Liquor Administrators, and the Michigan Association of Secondary School Principals, among others, about the effect on underage drinking if States should now lose their control over direct shipping.[13] The arguments of a financially interested California winery and a handful of Michigan oenophiles should not obscure the real concerns of those who deal with underage drinking on a daily basis.

The argument of plaintiffs that "[t]here is simply no evidence that . . . direct shipment would be a likely strategy for minors seeking to purchase liquor" (Br. 37) is false. In a Wirthlin survey, 35 percent of college students under 21 said they would be likely to purchase alcohol online if they could get away with it. C.A. App. 358. Indeed, minors are already having alcohol shipped to their homes. As plaintiffs note, one study showed that 10 percent of surveyed high-school seniors said they had used home delivery services to order alcohol. *See* Linda A. Fletcher et al., *Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers*, 61 J. Studies on Alcohol 81, 82 (2000). That the participants in the survey ordered from local retail stores, not out-of-state suppliers, hardly helps plaintiffs' argument. It demonstrates that minors can wait for alcohol to be delivered, and in this age of overnight delivery services it hardly takes "several days" (Br. 37) to ship alcohol across the country.

Plaintiffs' argument that minors are unlikely to drink wine (Br. 37) is both wrong and irrelevant. It is wrong because about 13 percent of 12th graders (more than a quarter of the 12th graders who report drinking alcohol) say they

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[13] *See* Ohio and 32 Other States Br. 23-24; Mich. Ass'n of Secondary School Principals Br. 3-23; Nat'l Alcohol Beverage Control Ass'n Br. 11; Ill. Alcoholism and Drug Dependence Ass'n Br. 5-16.

have consumed wine in the past 30 days.[14] It is irrelevant because, as discussed below in Part IV, plaintiffs' position would logically require States to permit direct shipment not only of wine, but of beer and spirits as well.

The Federal Trade Commission ("FTC") staff report on which plaintiffs heavily rely does *not* show the "twenty-six States that permit direct shipping have encountered no . . . problems." Br. 36. That conclusion was based entirely on the responses of 11 states to a questionnaire sent by the FTC. *See* Staff of the FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* 31-34, App. B (July 2003) ("FTC Staff Report").[15] None of those 11 States, however, had conducted any active investigation, making the FTC staff's "finding" virtually worthless.[16] As explained by *amici*, the only real way to detect illegal sales to minors is through "stings," since neither minors nor retailers report illegal sales, and such sales otherwise come to light only by chance as States investigate crimes or traffic accidents that happen to be related to an illegal purchase. *See* Mich. Ass'n of Secondary School Principals Br. 11-12.

The States that have investigated the problem have found that alcohol can be purchased by minors over the Internet with alarming ease. Michigan, for example, con-

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[14] National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2003* (Aug. 2004), Vol. I, at 501, 512, *available at* http://www.monitoringthefuture.org/pubs/monographs/vol1_2003.pdf. Five percent of 12th graders reported drinking 5 or more glasses of wine in a row within the past two weeks. *Id.* at 513. Furthermore, the Fletcher study did not find that the illegal deliveries reported in that study "were mostly of keg beer." Br. 38. The study revealed only that retailers that delivered alcohol were more likely than other retailers to sell keg beer; it made no attempt to determine what alcohol those retailers sold to minors. *See* Fletcher, *supra*, at 83.

[15] *Available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[16] North Dakota's response, for example, to the question "Have you had problems with out-of-state or in-state shippers shipping wine directly to minors?" was "No information." FTC Staff Report, *supra*, App. B. The State of Washington stated bluntly that out-of-state direct shipping "is a problem of concern" on a nationwide basis. *Id.*

ducted a series of stings, which revealed that one-third of the websites contacted allowed minors to purchase wine "with no more age verification than a 'click' of the mouse."[17] Massachusetts recently conducted a similar sting and discovered that underage college students were able to order beer, wine, and spirits from online retailers without having to verify their age. *See* Ohio and 32 Other States Br. 23.

B. Out-Of-State Alcohol Suppliers Cannot Be Regulated As Effectively As In-State Suppliers.

When they stop trying to deny the dangers posed by direct shipping, plaintiffs fall back to a second argument: that the dangers posed by out-of-state direct shipping are no greater than the dangers of in-state direct shipping and that States therefore do not need to distinguish between in-state and out-of-state entities in order to address these dangers. Plaintiffs propose instead a permit system that would license out-of-state entities to ship directly to consumers. Such a system, however, would overwhelm state regulators and leave them without their most effective tool: the ability to put violators out of business.

Michigan can enforce its alcohol regulations by inspecting licensees, attaching their property, and putting violators out of business by revoking their licenses. Plaintiffs' suggestion that Michigan license out-of-state wineries would not give Michigan anything like the same real power over them. To begin with, Michigan has no way to limit the number of licenses it could be required to grant and no practical way to oversee the thousands of wineries that might ship directly to Michigan consumers. As the Second Circuit noted, "Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless."

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[17] Irene M. Mead, State of Michigan's Remarks, Federal Trade Commission Workshop, *Possible Anti-Competitive Efforts to Restrict Competition on the Internet* (Oct. 8, 2002) 9-10, *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mead.htm; *see also* C.A. App. 322-327.

Swedenburg v. *Kelly*, 358 F.3d 223, 239 (2d Cir. 2004).[18] But even if Michigan could find some way to allocate a finite number of licenses without regard to location (*see* Br. 46), the cost of inspecting wineries as far away as California would be far higher, and plaintiffs cannot be serious in their suggestion (*see* Br. 43) that Michigan should have to depend on California to enforce *Michigan's* regulations against a California winery. Plaintiffs suggest Michigan could defray the higher inspection costs by imposing a higher fee for importation permits, but under plaintiffs' theory of the case, Michigan would have to justify its differential license fees under heightened scrutiny, since out-of-state licensees would inevitably pay more than in-state licensees.[19] Plaintiffs cannot have it both ways. Either Michigan has a right to draw rational distinctions between in-state and out-of-state entities or all such distinctions will end up in litigation.

Moreover, Michigan could threaten a noncompliant out-of-state winery only with the loss of its Michigan license, not with loss of its business. Plaintiffs effectively concede that this would be a less effective sanction and therefore argue that Michigan could instead rely on the federal Tax and Trade Bureau ("TTB") to revoke a noncompliant out-of-state winery's federal license, or could use the Twenty-first Amendment Enforcement Act ("TAEA"), 27 U.S.C. § 122a, to sue the winery in federal court. But neither is an effective substitute for state administrative control over entities

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[18] There is no support for plaintiffs' contention (Br. 43 n.19) that Michigan does not conduct inspections or searches of in-state wineries. The interrogatory cited by plaintiffs asked only what steps Michigan has taken "to enforce restrictions on deliveries to consumers" by in-state wineries. C.A. App. 100. Michigan said it had not taken any enforcement action regarding illegal deliveries (because there was no evidence of such deliveries), but Michigan cited other action that it had taken against in-state wineries (*see* D. Ct. Docket No. 54, Ex. 11, Attach. C), and it nowhere suggested that it does not inspect in-state wineries.

[19] None of the examples that plaintiffs cite in which Michigan charges differential fees based on the cost to the State in other regulatory areas (Br. 46) is analogous, since they all pertain to in-state entities; none involves Michigan charging higher fees to out-of-state entities as such.

with an in-state presence. The TTB has hardly "assured the States that will act on their complaints," as plaintiffs claim. Br. 46. In language omitted by plaintiffs, TTB said only that it "*could under appropriate circumstances* take administrative action." ATF Ruling 2000-1, *Direct Shipment Sales of Alcohol Beverages* (emphasis added).[20] Plaintiffs cite no case in which TTB has, in fact, acted on a State's complaint, and TTB denies any authority to take action against an out-of-state *retailer* that ships alcohol directly to a consumer. *See id.* More fundamentally, making enforcement of state laws dependent on federal officers is exactly what the framers of the Twenty-first Amendment did not want. As for the TAEA, there is no reported case in which a State has used it, and the statute hardly matches the deterrence provided by the threat of revoking an in-state entity's license in an administrative proceeding. The TAEA forces a State to litigate in federal courts across the country (to ensure personal jurisdiction), and the only remedy it provides is injunctive relief against further violations of the State's laws. *See* 27 U.S.C. § 122a.[21]

Michigan does, as plaintiffs note, currently license "out-state sellers of wine," Mich. Comp. Laws § 436.1109(9), but that system is not comparable to what plaintiffs propose, and it would not work for regulating direct shipping to consumers. Michigan currently licenses approximately 290 outstate sellers of wine (many of which are distributors that act as agents for numerous brands of wine) making enforcement much more manageable than under a licensing scheme involving thousands of wineries across the Nation. *See* C.A. App. 305-314. Furthermore, the current system allows licensees to ship into Michigan only through a limited number of in-state wholesalers, allowing Michigan regulators to match the records of the out-of-state seller against the re-

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[20] *Available at* http://www.atf.gov/alcohol/info/revrule/rules/2000-1.htm.

[21] *Cf. Swedenburg*, 358 F.3d at 239 n.13 (TAEA "while helpful to states, can only be used after a violation occurs. Under section 2, states have the authority to be proactive as well as reactive.").

cords of the in-state wholesaler to ensure that taxes are being collected and the State's other regulations are being respected. This Court has long recognized the importance of "localizing" alcohol sales in this manner.[22] Direct shipments of alcohol from thousands of wineries nationwide to an unlimited number of Michigan consumers would give the State no similar means of verifying regulatory compliance.

Michigan has also found that requiring a licensee with an in-state presence is important to revenue collection. Plaintiffs object to this but, ironically, 11 of the plaintiffs invoked the Fifth Amendment when asked whether they had paid the applicable Michigan taxes on alcohol they had ordered from unlicensed shippers. *See* C.A. App. 363, 372, 381, 386, 392, 399, 405, 423, 429, 435, 441. And plaintiffs' tax evasion is hardly exceptional. One complaint of the plaintiff wine buyers in *Bridenbaugh* was that Indiana's insistence on a state licensee would force them to pay Indiana taxes that California direct-shippers had not been collecting. 227 F.3d at 849-850. There may or may not be a legal problem in forcing out-of-state entities to collect and remit Michigan taxes, *cf.* Br. 41 n.17, *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992); C.A. App. 325-355, but there is an obviously greater practical problem when a State has no effective capacity to audit an out-of-state shipper, which has no attachable property in the State and cannot be put out of business.

Finally, plaintiffs' argument that because other States permit some limited forms of direct shipping, the Constitution requires Michigan to do exactly the same is fundamen-

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[22] *See Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 282-283 (1972) ("There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, [the State] establishes a check on the accuracy of these records. For example, when a manufacturer can transfer its goods to a wholesaler in the State only after it submits an invoice showing the price and after it receives permission for the transfer, it is easier for the State to enforce its requirement that the wholesale price in [the State] be no higher than that elsewhere in the country. The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes . . . .").

tally inconsistent with the Twenty-first Amendment principle that the choice belongs to each State. The Nation's history of alcohol regulation is that what is desired, or works, in one State may not be suitable for another. And more fundamentally, this case is not about whether all States should adopt some uniform regime of exceptions, but whether States can broadly require all importation to be done by licensed entities with a substantial in-state presence. That is the requirement that the court of appeals struck down.

IV. PLAINTIFFS' READING OF THE CONSTITUTION WOULD DESTROY THE "UNQUESTIONABLY LEGITIMATE" THREE-TIER SYSTEM.

Plaintiffs (wine consumers and one California winery) did not bring this case to eliminate the exception that allows a small number of licensed Michigan wineries to ship directly to their customers. Their objective, in which they succeeded at the Sixth Circuit, was to break down the requirement that all beverage alcohol go through in-state licensees, and their success would undo the three-tier system for regulating beverage alcohol. MB&WWA Br. 39-40. Plaintiffs do not deny this crucial point.

State control over the distribution of beverage alcohol *depends* on the principle that States may require out-of-state entities to sell through licensed in-state entities, even though the requirement is inherently "discriminatory" in the sense in which plaintiffs use that term. The system was conceived as an alternative to establishing state monopolies for the sale of alcoholic beverages in the post-Repeal era. *See* Wine & Spirits Wholesalers of Am. Br. 8-12. States found that they could achieve the benefits of a monopoly system without the burdens if they limited the right to traffic in alcoholic beverages to in-state entities known to, and licensed by, local officials. *Id.* at 10-11. Out-of-state manufacturers were free to introduce their products into the State, but only through the state-monitored three-tier system. *Id.*

Plaintiffs' interpretation of the Twenty-first Amendment would render the three-tier system subject to "strict scrutiny" and almost certainly unconstitutional. The three-

tier system permits only in-state wholesalers to sell to in-state retailers. *See North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in judgment). Under plaintiffs' novel and ahistorical "nondiscrimination" principle, this requirement would constitute facial discrimination. States would have to defend it under strict scrutiny, with the predictable result that the States would be required to allow any wholesaler anywhere to sell to in-state retailers.

Plaintiffs' principle would not stop there. Since Michigan allows in-state retailers to ship alcohol directly to in-state consumers, *see* Mich. Comp. Laws § 436.1203, plaintiffs' nondiscrimination principle would require Michigan to allow out-of-state retailers to ship alcohol directly to the State's consumers, or face strict scrutiny for not doing so. Even a State that barred all direct shipping would be open to the charge of discrimination, since only in-state retailers could sell directly to consumers. Such a State would have to defend its decision under heightened scrutiny, and plaintiffs' brief lays the groundwork for such a challenge, arguing that an in-state presence is not necessary for entities selling alcohol directly to consumers. *See, e.g.*, Br. 38 (minors "far more likely" to obtain alcohol illegally from in-state retailers than via direct shipping); Br. 41 (Michigan can protect tax revenues via permit system for direct shippers). Such a challenge would include all forms of alcohol sold by in-state retailers, and thus would open up the States to shipments of beer and spirits as well.

There is no stopping point short of the destruction of the three-tier system. Plaintiffs' principle would usher in an unrestricted national market in mail-order beverage alcohol—something that would shock the legislators who drafted the Amendment, who thought they had ensured that States would never again be powerless, as they were after *Bowman* and *Rhodes*, to regulate the direct shipment of beverage alcohol to their residents.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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In vino veritas.

– Pliny (A.D. 23-79)

ARGUMENT

I. NEW YORK'S DISCRIMINATORY AND PROTECTIONIST DIRECT SHIPPING BAN CONSTITUTES A *PER SE* VIOLATION OF THE COMMERCE CLAUSE.

Implicitly confessing a Commerce Clause violation, respondents and their *amici* state that this case would be different if it involved a commodity other than alcohol. In fact, this case is before the Court because it does *not* involve alcohol generally, but wine specifically.

That is because a majority of states, including New York and Michigan, have chosen to regulate wine distinctively, with a significant majority now allowing some direct shipping of wine (but not other types of alcohol) directly to consumers. The reasons for allowing direct shipping of wine are numerous and varied. Unlike other types of alcohol, varieties are infinite and distinct, and direct shipping is necessary to facilitate consumer choice. Wine is now produced in all 50 states, many of which (including New York) wish to promote their local wine industries. Direct shipping of wine does not seriously implicate concerns about underage access. And some states view direct shipping as a means of generating tax revenues. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003).

Among the majority of states that have chosen to treat wine distinctively for purposes of direct shipping, only a handful – including New York and Michigan – have chosen to discriminate, by freely allowing intrastate direct shipping while prohibiting it to out-of-state wineries. These

consolidated cases are not an attack on the three-tier system of alcohol distribution, which will remain intact regardless of the outcome of this lawsuit; nor do they seek unregulated traffic in wine. Rather, they seek only to confine the State to regulate the direct shipment of wine by one set of rules, not two.

A. Despite respondents' obfuscatory efforts, New York's direct shipment regulatory scheme blatantly discriminates.[1] No license is available for out-of-state wineries to ship directly to New York consumers (2d Cir. J.A. 306-46; *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970)).

The general counsel of the State Liquor Authority sets forth a cumbersome system by which out-of-state wineries theoretically may open a New York winery and warehouse, obtain a retailer license, and ship wine in vehicles owned by the winery or licensed by the State (2d Cir. J.A. 159-60).[2] The process is so convoluted that no winery ever has even attempted it (*id.* at 159). For the vast majority of wineries that are small, the burdens are Sisyphean. That is why this Court consistently has recognized that in-state

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[1] For a thorough discussion of New York's regulatory scheme and its effects upon in-state and out-of-state wineries, *see* Amicus Br. of Millbrook Vineyards & Winery.

[2] The State, apparently disavowing the testimony of its own witness, here for the first time suggests that other alternatives may be available (State Br. at 8). This appears to be an 11th-hour conversion, for previously the State consistently informed out-of-state wineries that no options existed for direct shipping (2d Cir. J.A. 306-46). In any event, such theoretical assurances late in the appellate process are unconvincing. As this Court admonished in a similar context in *Brown-Forman Distillers Corp. v. N.Y. St. Liquor Auth.*, 476 U.S. 573, 583 n.5 (1986), "The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency."

business operations requirements constitute *per se* violations of the Commerce Clause. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Ward v. Maryland*, 79 U.S. 418 (1870).

Even if a viable physical presence option existed, the playing field still is not level. The State (Br. at 39-40) tries to equate the various in-state direct shipping options. But as the chart at p. 28 of our opening brief illustrates, by far the easiest direct shipping opportunities (*e.g.*, no retailer license necessary, no second facility requirement, use of common carriers permissible) are limited on the face of the statutes to New York farm wineries (ABC Law §76-a(6)(d)), which are limited to New York wine products. Such a discriminatory system presents a classic *per se* Commerce Clause violation. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579.

B. In *Healy v. The Beer Inst.*, 491 U.S. 324, 340-41 (1989), the Court reiterated its "consistent practice of striking down state statutes that clearly discriminate against interstate commerce (citations omitted), unless that discrimination is *demonstrably justified by a valid factor unrelated to economic protectionism*" (emphasis added). In *Bacchus Imports v. Dias*, 468 U.S. 263, 270 (1984), the Court ruled that a finding of economic protectionism "may be made on the basis of either discriminatory purpose, or discriminatory effect." Both are here in abundance.

Respondents ignore the extensive record evidence of protectionist intent in multiple contexts: when the legislature extinguished direct interstate shipping options in 1970; when the legislature enacted the farm winery exemption for the express benefit of New York wineries; and when the governor vetoed direct interstate shipping legislation in 1995. *See* Opening Br. 3-5. *See also* Amicus Br. of George A. Akerlof, *et al.*, in No. 02-1116 (brief of Nobel laureate economists); Riekhof and Sykuta, "Regulating Wine by Mail," *Regulation* 30, 36 (Fall 2004) (empirical study finding that "economic interests in both the private and public sectors are the principal drivers of restrictions on direct interstate shipping of wine"). Indeed, in the district court, the State's then-candid counsel acknowledged that the direct shipping exemptions for New York wineries were aimed at promoting the State's domestic wine industry (Pet. App. 54a-55a). As in *Bacchus*, the Court does not have to guess about the motives underlying New York's discriminatory direct shipping regime.

C. Independent of its facial discrimination, the law is discriminatory in effect. *See Brown-Forman*, 476 U.S. at 592 (Stevens, J., dissenting) ("there should be ample evidence available to a concerned litigant to prove that this consequence has in fact developed"). While nearly every New York winery avails itself of direct shipping (Jt. App. 42-43), only a fraction of the tens of thousands of out-of-state wine labels are available to New York consumers (Jt. App. 187-89; 2d Cir. J.A. 3547-50, 3554-55, 3578-82, 3595). On a national scale, the Federal Trade Commission has found that bans on direct shipping limit consumer choice and raise prices. *See* FTC Study, *supra*. *See also* Jt. App. 38-39, 186-87; 2d Cir. J.A. 3578; Amicus Br. of Goldwater Inst. in No. 03-1116 at 12. The bans also adversely

impact the cargo transport industry, which depends upon uniform rules for national commerce, *see* Amicus Br. of Amer. Cargo Ass'n in No. 03-1116; as well as the vast potential of the Internet to enhance consumer choices. *See* Amicus Br. of Amer. Homeowners Alliance, *et al.*, in No. 03-1116.

D. The State easily could satisfy legitimate regulatory interests by making them "licensed and accountable" by conditioning direct shipping upon a permit,[3] as other states successfully have done. Amicus Br. of Calif. *et al.* in No. 03-1116 at 19-20.[4] Not only do States now have authority under the 21st Amendment Enforcement Act, 27 U.S.C. §122a, to enforce in their home federal courts any violations of valid laws against out-of-state wineries, but the federal government has power to revoke a winery's license for violating state laws under the Federal Alcohol Administration Act, 27 U.S.C. §204(d). As a consequence, the FTC reports no enforcement problems in states that allow direct interstate shipping. *See* FTC Study at 26-39; *see also* Amicus Br. of Wine Institute in No. 03-1116 (outlining nondiscriminatory alternatives). Given that New York imposes *no* regulations on intrastate direct shipping and the legislative history in the record reveals few such

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[3] The New York State Liquor Authority already has authority to provide permits for entities not encompassed by the liquor statutes (ABC Laws §105-9; Pet. App. 98a).

[4] As those States also point out (Br. at 2-3 and 10-14), it is inconsistent for respondents to argue that the 21st Amendment allows the greater power of discrimination but not the lesser power of evenhanded taxation. Indeed, states have wide latitude for nondiscriminatory taxation under the 21st Amendment. *See Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275 (1972). And, in fact, States that choose to do so successfully collect taxes on indirect wine shipments. *See, e.g.*, FTC Study at 38-40.

concerns, its post hoc rationalizations of its discriminatory regime ring hollow.

II. THE WILSON ACT, WEBB-KENYON ACT, 21st AMENDMENT, AND THIS COURT'S JURISPRUDENCE ALL EMBRACE THE PRINCIPLE OF NONDISCRIMINATION.

Instead of meeting their burden of demonstrating that the discriminatory regime is "demonstrably justified by a valid factor unrelated to economic protectionism," *Healy*, 491 U.S. at 341, respondents have chosen to ignore this Court's "wise reluctance to wade into the complex currents" underlying the enactment of the 21st Amendment. Cutting to the chase of their argument, New York dismisses *Bacchus* as an anomaly (State Br. at 28); while the liquor distributor respondents, along with Michigan and their state *amici*, candidly call on the Court to overturn it (Priv. Resp. Br. at 26 n. 8; Amicus Br. of Ohio, *et al.* in No. 03-1116 at 2; Mich. Br. in No. 03-1116 at 28). They press upon this Court an argument it has never accepted: that State authority under the 21st Amendment is plenary; or, as their state *amici* put it, that "the dormant Commerce Clause simply does not apply." Ohio Br. at 2.

Respondents' argument would sweep away not only *Bacchus*, but all of this Court's jurisprudence, beginning with *Hostetter v. Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), that harmonizes the Commerce Clause and 21st Amendment. Nothing would be left of the Commerce Clause in this context were the State allowed to rationalize even nakedly protectionist legislation within the ambit of its 21st Amendment powers. And if the Commerce Clause is so devoid of vitality, from where does Congress derive its power to regulate alcohol, as this

Court has sustained it in such cases as *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984)?

In reality, no such evisceration of the Commerce Clause is manifest in either the 21st Amendment or the Webb-Kenyon Act. To prove otherwise, respondents face a high hurdle. "[B]ecause of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes . . . only when the congressional direction to do so has been 'unmistakably clear'." *Maine v. Taylor*, 477 U.S. 131, 138-39 (1986); *accord*, *Wyoming v. Oklahoma*, 502 U.S. 458 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause"). A full contextual review of those enactments, buttressed by this Court's jurisprudence for the better part of two centuries, shows that far from unambiguously jettisoning the nondiscrimination principle at issue here, they fully embrace it.

A. Despite the twists and turns of jurisprudence and congressional enactments concerning alcohol over the past two centuries, two complimentary core principles have endured to this day: that State power is bounded by the police power and by the rule of nondiscrimination.

Early cases afforded states wide latitude to regulate or prohibit alcohol, provided the laws constituted "a legitimate exertion of the police powers." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *accord*, *License Cases*, 46 U.S. 504, 582 (1847). The Court in *Tiernan v. Rinker*, 102 U.S. 123, 126 (1880), held that a license fee on alcohol is valid only if nondiscriminatory, observing that the object of

the Commerce Clause is "to insure this uniformity against discriminating State legislation."

Hence, in *Walling v. Michigan*, 116 U.S. 446, 460 (1886), a unanimous Supreme Court invalidated a discriminatory state tax imposed upon the privilege of selling alcohol. The State asserted such regulation was a permissible exercise of the police power, but the Court disagreed, declaring that "[t]his would be a perfect justification of the act if it did not discriminate against the citizens and products of other States." *Id.* at 460. In other words, the police power simply does not encompass the power to discriminate against interstate commerce.

Subsequent cases began to limit state authority over alcohol in interstate commerce, thereby conferring an advantage to interstate over intrastate commerce, leaving only the latter subject to regulation under the police power. In *Bowman v. Chic. & N.W. Railway Co.*, 125 U.S. 465 (1888), the Court struck down a dry state's prohibition of interstate transportation of alcohol, holding that absent express congressional authorization, such interstate commerce was immune from state regulation. Dissenting, Justice Harlan, citing *Walling*, argued that such regulation was valid so long as it did not discriminate against interstate commerce. *Id.* at 517-518 (Harlan, J., dissenting). In *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court extended immunity to sales to residents in unopened packages. Justice Gray dissented, again distinguishing the case from *Walling* because the law treated interstate and intrastate commerce equally. *Id.* at 152 (Gray, J., dissenting).

Congress responded in 1890 by enacting the Wilson Act, which extinguished the immunity attaching to interstate

commerce. The debates focused on overturning *Bowman* and *Leisy*; no disapproval whatsoever was expressed of *Walling* or the nondiscrimination principle.[5] To the contrary, the law provided that

> [all] . . . intoxicating liquors . . . transported into any State or Territory . . . shall upon arrival . . . be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such . . . liquors had been produced in such State or Territory*. . . .

27 U.S.C. §121 (emphasis added).

In so doing, Congress expressly preserved both the police power limitation, which precludes discrimination, and the nondiscrimination principle. Subsequent cases so held. In *In re Rahrer*, 140 U.S. 545, 554 (1891), the Court upheld the constitutionality of the Wilson Act, holding that state laws were valid where passed "legitimately for police purposes." In confronting *Bowman* and *Leisy*, the Court observed, "Congress has now spoken, and declared that imported liquors . . . shall, upon arrival in a State, fall within the category of domestic articles of a similar nature." *Id.* at 560. Even more to the point, the Court in *Scott v. Donald*, 165 U.S. 58 (1897), struck down a law that limited the sale of alcohol to in-state producers. Under the Wilson Act, the Court held, "equality or uniformity of treatment under state law was intended." *Id.* at

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[5] For two thorough treatments of the legislative history of the Wilson Act, the Webb-Kenyon Act, and the 21st Amendment, *see* Amicus Br. of DKT Liberty Project and Amicus Br. of Napa Valley Vintners, both in No. 03-1116.

100. In language directly on point to the present case, the Court declared that under a State's police power,

> a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce. . . .

Id.

The Court proceeded to strike down a pair of laws forbidding direct interstate shipments of wine for personal use, holding they were an invalid regulation of interstate commerce. *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898). Dissenting and citing *Scott* approvingly, Justice Gray admonished that such regulations were within the States' police power so long as they did not discriminate against interstate commerce. *Rhodes*, 170 U.S. at 431-35 (Gray, J., dissenting).

Congress acted to remove the immunity "in certain cases," enacting the Webb-Kenyon Act, 27 U.S.C. §122, which overturned *Rhodes* and *Vandercook*. Again, the legislative history is bereft of any intent to disturb the venerable nondiscrimination principle.[6] In sustaining the

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[6] Construing the Webb-Kenyon Act not to shield a discriminatory liquor purchase law, the South Carolina Supreme Court applied *Scott* in holding that the act eliminated immunity "of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other States."

(Continued on following page)

act's constitutionality, the Court in *Clark Distilling Co. v. Western Md. Railway Co.*, 242 U.S. 311, 318 (1917), applied the act to sustain a nonimportation law that forbade "all shipments . . . whether from within or without the State." The Court explained that Webb-Kenyon "was enacted simply to extend that which was done by the Wilson Act," *i.e.*, to "prevent the immunity characteristic of interstate commerce" from affording "a means by subterfuge and indirection" to thwart valid State laws. *Id.* at 324. Thus the Wilson and Webb-Kenyon Acts established the dual cornerstones of state regulation that persist to this day: broad State authority to regulate alcohol pursuant to its police powers and subject to the rule of nondiscrimination.

Passage of the 18th Amendment nationalized what previously was primarily a state issue. Though the legislative history of the 21st Amendment is often contradictory, two points are beyond dispute: (1) nowhere does it disturb the continuing vitality of cases like *Walling* and *Scott* or the nondiscrimination principle they embody; and (2) the 21st Amendment embraced and constitutionalized the Wilson and Webb-Kenyon Acts, and restored the status quo ante.[7] *Craig v. Boren*, 429 U.S. 190, 205 (1976). For good measure, Congress subsequently re-enacted the

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Brennan v. So. Express Co., 90 S.E. 402, 404 (S.C. 1916). Respondents cite no cases to the contrary.

[7] *See* DKT Liberty Amicus Br. at 21-29; Napa Valley Vintners Amicus Br. at 18-26. As those briefs demonstrate, the rejection of the proposed §3 of the amendment, pertaining to concurrent federal authority to regulate saloons, did not indicate congressional intent to divest itself of regulatory authority over alcohol, but rather to preserve traditional State authority over saloons.

Webb-Kenyon Act because its constitutionality, absent congressional re-authorization, was in dispute.

Applying the newly enacted amendment in *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 61 (1936), the Court upheld a license fee for alcohol importation that was "the same whether the beer to be sold is imported or domestic."[8] The Court emphasized the narrowness of its decision, observing that the plaintiffs contended that to sustain the license fee would require construing the 21st Amendment as having "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization." *Id.* at 64.

Purporting to apply *Young's Market*, the Court upheld discriminatory legislation with cursory analysis in a trio of cases in 1938-39. *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Joseph F. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939). Indeed, the Court went so far as to hold in *Indianapolis Brewing*, 305 U.S. at 394, that a State's 21st Amendment powers are unbounded even by the Equal Protection Clause – a proposition that subsequently has been completely repudiated. *See Craig v. Boren*, *supra*; *accord Midcal*, 445 U.S. at 108.

But the Court immediately returned to an approach that balanced competing constitutional interests. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939), the Court rejected a challenge to the labeling provisions of the federal Alcohol Administration Act,

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[8] Indeed, the Court observed that in-state brewers actually were charged a higher fee. *Id.* at 64.

expressly disavowing the plenary authority argument respondents press here. The law was attacked on the ground that the 21st Amendment "gives to the States complete and exclusive control over commerce in intoxicating liquors. . . . We see no substance in this contention." *Id.* at 173. And in sustaining a state law that channeled alcohol traffic through prescribed mechanisms, the Court in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), emphasized the state's "police authority" to adopt "reasonably appropriate" alcohol regulations, noting that the state law at issue "creates no discrimination against interstate commerce. It is subjected to the same regulations as those applicable to intrastate commerce." *Id.* at 140.

Hence, when the Court in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964), faced the question whether, as respondents here assert, the 21st Amendment "obliterates" the Commerce Clause, it construed narrowly its prior rulings and soundly rejected the notion. To this "absurd oversimplification," the Court observed that if "the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Id.* at 332. Instead, the Court admonished, "[B]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. . . . [E]ach must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*

Thus in *Midcal*, 445 U.S. at 106, which pitted the exercise of congressional authority under the Commerce Clause against a State's 21st Amendment core power, a unanimous Court ruled that the "national policy in favor of

competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." In *Capital Cities*, 467 U.S. at 713-714, the Court likewise balanced federal Commerce Clause powers against 21st Amendment interests, striking down a state alcohol advertising regulation.

It is within this solid tradition that *Bacchus* fits.[9] The proper approach under *Bacchus* and this Court's other 21st Amendment cases, therefore, is to query whether in a particular case "the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended," 468 U.S. at 275; and to eschew economic protectionism, *id.* at 276, and the discrimination that renders it apparent. *Id.* at 270. *Bacchus* thus endorsed and reaffirmed the same nondiscrimination principle that this Court had applied for nearly all of the previous century.

The Court applied *Bacchus* in *Brown-Forman*, 476 U.S. at 585, holding that a price affirmation statute, defended as an exercise of the State's core 21st Amendment powers, "on its face violates the Commerce Clause, and is not a valid exercise of New York's powers under the Twenty-first Amendment." In *Healy*, 491 U.S. at 339-340, the Court likewise struck down a price affirmation statute under the Commerce Clause both because of its extraterritorial effect *and* because it was discriminatory. Though the State had a legitimate interest in securing lower prices, the Court held that that policy "is not advanced by . . . exempting brewers and shippers engaging in solely domestic sales." *Id.* at 341;

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[9] This Court subsequently affirmed that *Bacchus* did not change that law but rather "applie[d] legal rules already decided" in holding that it should have retroactive effect. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991) (Opinion of Souter, J.).

see also id. at 344 (Scalia, J., concurring) (the statute's invalidity "is fully established by its facial discrimination against interstate commerce . . . and by [the State's] inability to establish that the law's asserted goal of lower consumer prices cannot be achieved in a nondiscriminatory manner").

Finally, if Congress or this Court has conferred power upon States to discriminate, one entity to which that clearly would come as a surprise is Congress. In enacting the 21st Amendment Enforcement Act, 27 U.S.C. §122a, to answer the states' call for additional regulatory authority to police interstate commerce over alcohol, Congress in subsection (e) expressly limited such authority to "a valid exercise of power" under the 21st Amendment as it "is interpreted by the Supreme Court . . . including interpretations in conjunction with other provisions of the Constitution." 27 U.S.C. §122a(e). Legislative history makes clear that the law's framers understood the applicable provisions to include the dormant Commerce Clause and its rule of nondiscrimination as applied by *Bacchus*. *See, e.g.*, 146 Cong. Rec. S10197 (daily ed. Oct. 11, 2000) (Statement of Sen. Hatch) ("this bill does not, even unintentionally, somehow change the balancing test employed by the Courts in reviewing State liquor laws); 106 Cong. Rec. S10214-15 (daily ed. Oct. 11, 2000) (Statement of Sen. Feinstein) (applying *Hostetter* and *Bacchus* to the effect that "the 21st Amendment cannot be used by the States to justify liquor laws which, by favoring instate businesses, discriminate against out-of-state sellers"). *See also* Amicus Br. of Members of the U.S. Congress in No. 03-1116 at 20-21.

In sum, the principle of nondiscrimination is deeply embedded in the common law notion of police power, in

over 150 years of jurisprudence, and in the affirmative exercise of congressional power under the Commerce Clause. The Court should continue to honor that principle here.

III. A DECISION ALLOWING DISCRIMINATION WOULD COLLIDE WITH OTHER CONSTITUTIONAL GUARANTEES.

All parties agree that whatever its effect on the Commerce Clause, the 21st Amendment leaves intact all other constitutional guarantees. Rather than answer the argument, respondents urge the Court to ignore other constitutional provisions, especially the privileges and immunities clause, that plainly would proscribe discriminatory treatment against out-of-state entrepreneurs. *See* Amicus Br. of Va. Wineries Ass'n.

In fact, the Court has considered the Commerce Clause in construing the Privileges and Immunities Clause even where it was not raised in a case. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). That makes abundant sense given that a number of constitutional guarantees, including the Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause, all "are united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, "Naked Preferences and the Constitution," 84 *Colum. L. Rev.* 1689, 1689 (1984); *see also id.* at 1709 ("The basic themes of the [Privileges and Immunities Clause] are almost identical to those of the dormant commerce clause").

Likewise, the Court would do well to take account of the nondiscrimination command of the Privileges and Immunities Clause in construing the proper lines of demarcation between the Commerce Clause and the 21st Amendment. In so doing it will find further imperative for preserving and applying here the principle of nondiscrimination.

IV. THE PROPER REMEDY IS TO EXTEND REGULATED DIRECT SHIPPING ON NONDISCRIMINATORY TERMS.

The district court fashioned the appropriate remedy, opening direct shipping to out-of-state wineries on the same terms and conditions as in-state wineries (Pet. App. 72a-73a). The liquor distributor respondents argue instead that the Court should strike provisions that make in-state shipping lawful.[10] Such a remedy would be a jackpot for the liquor distributors: even in losing their case, their oligopoly over alcohol distribution would be made absolute, a perverse result in a case that seeks to vindicate consumer freedom and eradicate economic protectionism.

The question of remedy, however, is not before the Court. The Court granted review only on the threshold merits question of whether a State's discriminatory treatment of direct shipment of wine violates the Commerce

[10] That the farm winery exemption has a severance clause is of no moment: either remedy requires the Court to sever something, either the challenged exclusion of interstate shipping or the in-state exemptions. The New York ABC laws are so riddled with favoritism for New York wineries that finding and severing them all would require an exacting search.

Clause. Hence, the issue has not been fully briefed before this Court.

In any event, such a remedy also would violate the general principle that where a provision is unconstitutional because its benefits are under-inclusive, "extension, rather than nullification, is the proper course." *Califano v. Wescott*, 443 U.S. 76, 89-90 (1979); *see also Kassel v. Consolidated Freightways*, 450 U.S. 662 (1982) (in Commerce Clause challenge to limit on truck size that included intrastate exemptions, proper remedy was to strike ban).

An equally compelling reason to avoid the liquor distributors' proposed remedy is that it would create, by judicial fiat, a new crime, given that violation of the ABC laws comprises a criminal misdemeanor. The scores of New York wineries who today lawfully ship directly to consumers would be committing a criminal offense. Courts should not choose a remedy whose effect is to transform an act made lawful by the legislature into a criminal act,[11] for "the discretion to . . . define criminal offenses and prescribe punishments, resides wholly with state legislatures." *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984). *Accord*, *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (judgments about defining criminal offenses and punishments belong to the legislature); *Bousely v. United States*, 523 U.S. 614, 621 (1998) (only the legislature, not the courts, can make conduct criminal); *Hutto v. Davis*,

[11] Indeed, in 1995, the Legislature overwhelmingly approved direct interstate shipping legislation, only to have it vetoed by the governor (2d Cir. J.A. 442-444, 450-52). Such action, along with its creation of in-state direct shipping, evidences a clear legislative preference for inclusion, rather than for extinguishing a vital economic opportunity for New York wineries.

454 U.S. 370, 371 (1982) (defining what conduct constitutes a crime is a basic line-drawing process within the province of the legislature, not the courts). The proper remedy is to extend the direct shipping opportunity on equal terms, precisely as the district court did.

CONCLUSION

On multiple occasions over the past 40 years, this Court has rejected State efforts to invoke the 21st Amendment to cleanse their constitutional sins. New York here persists in arguments it has made repeatedly over that same period to shield economic protectionism from constitutional scrutiny. *See Hostetter*, *supra*; *Brown-Forman*, *supra*; *Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y.), *aff'd sub nom.*, *Loretto Winery, Ltd. v. Duffy*, 761 F.2d 140 (2d Cir. 1985) (striking down discriminatory statute authorizing sale of certain domestic alcohol in grocery stores). The holding in those cases should be the same here: the 21st Amendment, broad though the powers it confers upon states may be, provides no sanctuary for economic protectionism.

Respectfully submitted,

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JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* THE BEER INSTITUTE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amicus, The Beer Institute, is the leading trade association for the brewing industry and its suppliers. It is recognized as the authoritative source of information on all aspects of the industry. Since its inception in 1986, The Beer Institute routinely has voiced its members' concerns to Congress and the Court over matters concerning the regulation of the alcohol beverage industry, commercial speech, and responsible consumption.

The Beer Institute's members include domestic and international brewers, who produce 90 percent of the beer consumed in the United States. They directly employ over 400,000 Americans who receive over $13 billion in wages and benefits. For nearly 70 years, The Beer Institute's members have relied on the three-tier distribution system that most States have established to regulate and control the distribution, sale, and consumption of alcohol beverages. The reasonable restrictions in the direct distribution law at issue here are integral to that "unquestionably legitimate" regulatory system. *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion). Accordingly, *amicus* has a strong interest in the outcome of this matter. *Amicus* urges the Court to affirm the decision of the Court of Appeals for the Second Circuit, and hold that New York's direct distribution law is a proper exercise of that State's express powers under the Twenty-first Amendment.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

SUMMARY OF ARGUMENT

This case is about the right of States to regulate the importation of alcohol beverages – a right expressly embedded in the Constitution and federal law. *See* U.S. Const. amend. XXI, § 2; Webb-Kenyon Act, 27 U.S.C.A. § 122 (West 1927 & Supp. 2004). The court below affirmed that right, upholding a New York law that permits out-of-state wineries to ship wine directly to New York consumers provided that those wineries comply with New York's licensing requirement, including a requirement that those wineries have a physical presence in New York, just as in-state wineries must do. *See Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004). The lower court correctly rejected Petitioners' argument that this physical presence requirement ran afoul of dormant Commerce Clause principles by discriminating against out-of-state wineries. *See id.* at 233-37. However, the court did not even have to consider the dormant Commerce Clause because the Twenty-first Amendment's plain language is conclusive.

Petitioners seek to reverse the decision below. They maintain that the direct distribution law violates the dormant Commerce Clause, and that the powers conferred upon the States by the Twenty-first Amendment are insufficient to "save" the law. Petitioners are wrong.

The first step of any constitutional law analysis must be consideration of the express language of the constitutional provision in question. The Twenty-first Amendment expressly gives each State the power to regulate the "transportation and importation" of alcohol beverages for "delivery and use" within that State. U.S. Const. amend. XXI, § 2. New York exercised its express Twenty-first Amendment powers when it enacted its direct distribution

law. As a matter of strict constitutional interpretation, that law is immune from challenge under the dormant Commerce Clause. That should be the end of the analysis in this case.

Furthermore, even if the Court were to review the legislative history underlying the Twenty-first Amendment, it would find that the unequivocal intent was to insulate the States from Commerce Clause challenges when the States exercise their express Twenty-first Amendment powers. Both the events leading up to passage of the Amendment, as well as the statements made by members of Congress at the time they were considering the Amendment, show that the Amendment was drafted for the purpose of eliminating any Commerce Clause impediment from a State's efforts to regulate the alcohol beverage distribution system within its borders.

Consistently, this Court has held that a State's exercise of its express Twenty-first Amendment powers may not be subjected to a Commerce Clause challenge. Petitioners do not and cannot identify a single decision of this Court that contravenes that principle. Rather, every case that Petitioners rely upon involved alcohol beverage regulations that, unlike the New York law in question, were *not* enacted pursuant to a State's express Twenty-first Amendment powers.

Finally, even if the Court were to abandon the literal language of the Twenty-first Amendment, as well as 60 years of its precedent, and instead adopt the new test proposed by Petitioners, the New York statute would still be upheld. According to Petitioners, the statute can only be upheld if it is "closely related" to the purposes of the Twenty-first Amendment, such that Commerce Clause

concerns could be overcome. Here, there can be no doubt that the New York statute is closely related to the purposes of the Twenty-first Amendment. Most significantly, the statute helps to prevent underage drinking by creating a scheme by which the State can enforce its ban on internet sales of alcohol beverages to minors.

This should not be a difficult case. The decision below was mandated by the plain language of the Twenty-first Amendment, as well as an unbroken line of decisions issued by this Court. The Second Circuit's decision upholding the New York statute should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE TWENTY-FIRST AMENDMENT RESOLVES THIS CASE

"In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the *language* of the provision rather than the history behind it." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-107 (1980) (emphasis supplied). The Court has focused on the language of the Twenty-first Amendment because it is clear and unambiguous:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

Petitioners are trying to do precisely what the Twenty-first Amendment prohibits. They are trying to "import" alcohol beverages for "delivery or use" within the State of New York "in violation of the laws" of that State. As such, their challenge to the New York law must be rejected. *See State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936) (upholding California law that imposed an importation fee on alcohol beverages: "The words used [in the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes").

As this Court has stated, "[t]he Twenty-first Amendment grants States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S. at 110. There can be no doubt that New York's direct distribution law asserts control in precisely those areas. Specifically, the law mandates that wine may be imported into New York by out-of-state wineries, and distributed within the State, only if (i) the wineries obtain a license, which in turn requires having a physical presence or location within the State, and (ii) the wine is imported to that physical location for direct distribution to consumers. *See* N.Y. Alcohol Bev. Cont. Law ("ABC Law") § 100(1) (McKinney's 2000 & Supp. 2004) ("No person shall . . . sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefore required by this chapter"); *id.* § 102(1)(c) ("[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcohol beverages"); *id.* § 3(37) (out-of-state wineries must "maintain[] a branch factory, office or storeroom within the state of New York and receive wine in this state").

The plain language of the Twenty-first Amendment endorses the validity of statutes – such as the New York law – that regulate the importation and transportation of alcohol beverages. Where, as here, the words of a constitutional amendment are unambiguous, "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 259 (1992) (citation omitted); *Midcal*, 445 U.S. at 106-107. The Second Circuit's decision should be affirmed based solely on the literal language of the Twenty-first Amendment.

II. PETITIONERS' DORMANT COMMERCE CLAUSE ARGUMENT IS CONTRADICTED BY THE TWENTY-FIRST AMENDMENT'S LEGISLATIVE HISTORY AND RELEVANT PRECEDENT

Notwithstanding the literal language of the Twenty-first Amendment, Petitioners contend that New York's direct distribution law should be struck down under the dormant Commerce Clause. That contention is directly refuted by the legislative history of the Twenty-first Amendment, as well as this Court's Twenty-first Amendment jurisprudence, which make clear that the Twenty-first Amendment removed any dormant Commerce Clause obstacle to state regulation of the transportation and importation of alcohol beverages.

A. The Legislative History Demonstrates that Dormant Commerce Clause Concerns Do Not Trump the Twenty-first Amendment

1. The Nation's Experience Before the Twenty-first Amendment

In order to understand what the Twenty-first Amendment accomplished, it is helpful to consider the

evolution of this Court's case law predating the Amendment. During our nation's first century, the Commerce Clause was not interpreted as a limitation on the States' police powers over the importation and sale of alcohol beverages. *See Craig v. Boren*, 429 U.S. 190, 205 (1976). As Chief Justice Taney wrote in 1847, "I see nothing in the constitution of the United States to prevent [a State] from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." *The License Cases*, 46 U.S. 504, 577 (1847).

But in 1890, the Court rejected Chief Justice Taney's reasoning as too narrowly construing the reach of the Commerce Clause. *See Leisy v. Hardin*, 135 U.S. 100, 118 (1890). The Court ruled that the Commerce Clause places the power to regulate interstate commerce in alcohol beverages exclusively with Congress. *See id.* Because Congress had not regulated such commerce, the Court reasoned that Congress intended such commerce to remain "free and untrammeled." *Id.* at 109-10. As a result, the Court held that a State could not exercise its police power over any alcohol beverage shipped into the State from outside its borders until that product lost its characteristics as interstate commerce by either removal from its original package or sale. *See id.* at 124-25.

The *Leisy* Court's interpretation of the Commerce Clause made it virtually impossible for States to prevent the importation and initial sale of any beverage alcohol product in its original package. The Court, however, did suggest a solution to this problem:

> [T]he responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within

> its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Id. at 123-24.

Almost immediately after *Leisy*, Congress enacted the Wilson Act, which provided that a State could exercise its police powers over alcohol beverages as soon as the alcohol beverages arrived in that State. *See* 27 U.S.C.A. § 121 (West 1927 & Supp. 2004). The Court upheld the Wilson Act in *Wilkerson v. Rahrer*, 140 U.S. 545 (1891), rejecting an argument that Congress had unconstitutionally delegated its Commerce Clause power to the States. Rather, Congress had "imparted no power to the state not then possessed," but had "simply removed an impediment to the enforcement of the state laws." *Id.* at 564. The Wilson Act, however, proved ineffective because it did not remove the Commerce Clause's impediment to state regulation until after the packages had entered the State. *See Rhodes v. Iowa*, 170 U.S. 412 (1898).

To address the deficiency in the Wilson Act, Congress passed the Webb-Kenyon Act, which was intended "to withdraw the protecting hand of interstate commerce from intoxicating liquors." H.R. Rep. 1461, 62d Cong., 3d Sess. 1 (1913). The language of the Webb-Kenyon Act prefigured Section 2 of the Twenty-first Amendment:

> The shipment or transportation, in any manner or by any means whatsoever, of . . . intoxicating liquor of any kind, from one State, Territory, or District of the United States . . . into any other State, Territory, or District of the United States . . . intended, by any person interested therein, to be received, possessed, sold, or in any manner

> used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States . . . is hereby prohibited.

27 U.S.C.A. § 122 (West 1927 & Supp. 2004). The Court upheld the Webb-Kenyon Act in *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917), stating that the Act "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id.* at 325. Two years after *James Clark Distilling*, the States ratified the Eighteenth Amendment and ushered in the Prohibition Era. Prohibition lasted until the States ratified the Twenty-first Amendment in 1933.

2. The Amendment's Legislative History

In addition to repealing the Eighteenth Amendment, *see* U.S. Const. amend. XXI, § 1, the Twenty-first Amendment was intended to create an exception to the Commerce Clause whereby States could regulate the importation and transportation of alcohol beverages. As the Court explained in *Craig v. Boren*:

> The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

429 U.S. at 205-206 (citations omitted); *accord Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984).

The Court's conclusion in *Craig* concerning the Amendment's intent is amply supported by the legislative history of the Twenty-first Amendment. The Resolution that became the Twenty-first Amendment originated in the Senate. Senator Blaine, chairman of the subcommittee that held hearings on the Resolution and floor manager of the Resolution in the Senate, stated that the purpose of Section 2 was "to restore to the States . . . *absolute control* in effect over interstate commerce affecting intoxicating liquors." 76 Cong. Rec. 4143 (1933) (emphasis added). Similarly, Senator Borah, who was known as an "authoritative" advocate of Prohibition, described Section 2 as "incorporating [the Webb-Kenyon Act] permanently in the Constitution of the United States." *Id.* at 4172.

Confirming the intent of the Amendment to withdraw any impediments from the Commerce Clause, the Senate rejected proposed Section 3. That Section provided that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933). In urging the rejection of Section 3, Senator Blaine argued that what Section 2 gave the States, Section 3 took away: "Thus [under Section 2] the States are granted larger power in effect and are given greater protection, while under Section 3 the proposal is to take away from the States the power that the States would have in the absence of the eighteenth amendment." *See id.* at 4143; *see also id.* at 4147 (remarks of Senator Wagner) ("if sales may be regulated, so may transportation and manufacture. . . . If that is to be the history of the proposed amendment . . . then obviously we have expelled the system of national control through the front door of section 1 and readmitted it forthwith through the back door of section 3").

After the States ratified the Twenty-first Amendment, Congress reenacted the Webb-Kenyon Act. *See* Act of Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877. In so doing, Congress made clear that it had withdrawn any Commerce Clause impediment to state laws regulating the distribution of alcohol beverages.

B. Precedent Confirms that the Powers Conferred Upon the States by the Twenty-first Amendment Are Not Constrained by Dormant Commerce Clause Principles

The Amendment's plain language and legislative history notwithstanding, lower court decisions addressing direct distribution laws have turned on interpretations of the Court's Twenty-first Amendment jurisprudence. Those lower courts that have upheld direct distribution laws have correctly understood this Court's decisions as confirming that the States may regulate the importation of alcohol beverages free of any dormant Commerce Clause concerns. *See Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (upholding Indiana direct distribution law), *cert. denied sub nom. Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

In contrast, those lower courts that have struck down direct distribution laws have incorrectly interpreted this Court's decisions as elevating dormant Commerce Clause principles over the plain text of the Twenty-first Amendment. *See Heald v. Engler*, 342 F.3d 517, 522-23 (6th Cir. 2003) (striking down Michigan direct distribution law; acknowledging the earlier decisions in which "the Supreme Court afforded states broad power to regulate alcohol under the [Twenty-first] Amendment," but stating

that "[a]s early as the 1960s, the Supreme Court signaled a break with [this] line of reasoning"), *cert. granted sub nom. Granholm v. Heald*, 124 S.Ct. 2389 (2004) (Case No. 03-1116) & *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, 124 S.Ct. 2389 (2004) (Case No. 03-1120). *Accord Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003) (striking down Texas direct distribution law); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (striking down North Carolina direct distribution law); *see also Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (reviewing Florida direct distribution law; remanding for further fact finding). As demonstrated below, the Courts of Appeals for the Fourth, Fifth, Sixth, and Eleventh Circuits mistakenly relied upon this Court's cases that – unlike the instant case – did not involve exercises of state powers squarely within the Twenty-first Amendment.

1. The Court's Decisions Immediately Following Ratification Recognized that the Dormant Commerce Clause Does Not Trump the Twenty-first Amendment

In the years immediately following ratification, the Court repeatedly held that the Twenty-first Amendment empowered States to regulate the importation and transportation of alcohol beverages into and within their borders, even when doing so offended dormant Commerce Clause principles. For example, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court upheld a California statute that imposed a $500 license fee for the privilege of importing beer into the State. Relying on the plain language of the Amendment, the Court expressly rejected plaintiffs' argument that the licensing

fee impermissibly discriminated against out-of-state interests:

> The words [of the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it.

Id. at 62.

This Court's cases that followed *Young's Market* reiterated that, when States exercise their powers under the Twenty-first Amendment, they are immune from Commerce Clause challenges. *See Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (upholding Michigan's retaliatory statute prohibiting liquor importation from States that discriminated against beer manufactured in Michigan: "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"); *Ziffrin v. Reeves*, 308 U.S. 132, 138 (1939) (upholding Kentucky regulation of the production and distribution of alcohol beverages: "The Twenty-first Amendment sanctions the right of the state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause"); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) (upholding Minnesota law that prevented importation of liquor containing more than 25 percent alcohol unless

liquor was registered with the U.S. Patent Office: "discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic").

Petitioners, apparently realizing that the *Young's Market* line of cases is dispositive here, argue that those cases have been overruled. *See* Pet. Br. at 33 n.22. But this Court continues to cite *Young's Market* and the decisions that followed it, and those cases remain good law today. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-15 (1996) (quoting *Ziffrin*); *North Dakota v. United States*, 495 U.S. 423, 431-32 (1990) (citing *Young's Market*). Certainly, this Court has never suggested that those cases have been overruled in any respect. *Young's Market* and its progeny require an affirmance of the Second Circuit's decision.

2. Contrary to Petitioners' View, this Court's More Recent Decisions Confirm that the Dormant Commerce Clause Does Not Trump the Twenty-first Amendment

Petitioners mistakenly contend that, beginning with the Court's decision in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court has distanced itself from its earlier decisions and held that the Twenty-first Amendment does not override the dormant Commerce Clause. *See* Pet. Br. at 33 & n.22. Although the Court has invalidated laws that regulate in the area of alcohol beverages, none of those cases involved a State's express powers under the Twenty-first Amendment to regulate the "transportation or importation" of alcohol beverages "for delivery or use" within the State. Moreover, in the very cases relied upon by Petitioners, the Court repeatedly has

confirmed that a State is not constrained by the dormant Commerce Clause when it regulates the distribution of alcohol beverages for use within its borders, such as New York has done with its direct shipping law.

Hostetter did *not* involve a State's regulation of alcohol beverages "for delivery or use" within that State. Rather, the Court struck down on Commerce Clause grounds a New York law that prohibited a retailer located at John F. Kennedy Airport from selling alcohol beverages that were "not delivered to the customer until he arrive[d] at his foreign destination." *Id.* at 325; *see id.* at 333 ("Here, ultimate delivery and use is not in New York, but in a foreign country"). The New York law conflicted with a federal agency's approval of the retailer's proposed method of operations. *See id.* at 326.

This Court held that New York's law was not an exercise of the State's express powers under the Twenty-first Amendment:

> The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. . . . Rather, the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do.

Id. at 333-34. Because the New York law at issue in *Hostetter* did not fall within that State's express Twenty-first Amendment powers, it could not withstand a Commerce Clause challenge.

More to the point, the *Hostetter* Court itself confirmed that where, as here, a State regulates the importation and transportation of alcohol beverages for delivery or use within that State, the State is not constrained by the dormant Commerce Clause:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . . This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.

See Hostetter, 377 U.S. at 330-31. Thus, far from undermining *Young's Market* and its progeny, *Hostetter* confirmed the holding of those decisions.

Petitioners fare no better with the other decisions upon which they rely for their misguided notion that this Court has abandoned the literal language of the Twenty-first Amendment. *See* Pet. Br. at 33-36. Those decisions do not involve laws regulating the "transportation or importation" of alcohol beverages. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court upheld a Sherman Act challenge to California's liquor resale price maintenance statute. In so doing, the Court acknowledged that the challenged statute was not enacted pursuant to the State's express Twenty-first Amendment powers. *See id.* at 111-14.

Moreover, the Court reiterated that when a State does pass a law pursuant to its express Twenty-first Amendment powers, that law cannot be subjected to a Commerce Clause challenge. The *Midcal* Court stated:

> The Twenty-first Amendment grants the States *virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system*. Although states retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.

Id. at 110 (emphasis added). The Court concluded that the California statute was not so closely connected to the importation and distribution of alcohol beverages such that it could trump the federal government's interest in enforcing a "national policy in favor of local competition." *Id.* Here, in contrast, New York's law plainly falls into the areas of importation and distribution – the areas in which the States have "virtually complete control."[2] *Id.*; *see* Point I, *supra*.

The same point was made again in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), another case mistakenly relied upon by Petitioners. At issue was an Oklahoma statute that required cable service providers to

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[2] The instant case does not involve the category of "other liquor regulations" described in *Midcal*, and so there is no need to decide what test should be applied by the courts when such a regulation conflicts with the Commerce Clause. Based on *Midcal*, it appears that some sort of balancing test should be applied, which would acknowledge that, even when States are not exercising their express Twenty-first Amendment powers, the Amendment imparts heightened powers (relative to the Commerce Clause) for regulating in the alcohol beverage area.

delete all advertisements for alcohol beverages contained in the out-of-state signals they transmitted to their Oklahoma customers. The Court stated:

> The central question presented in [*Hostetter* and *Midcal*] is essentially the same as the one before us here: whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Id. at 714; *see also id.* at 713 ("we have held that when a state has not attempted to directly regulate the sale or use of liquor within its borders – the core § 2 powers – a conflicting exercise of federal authority may prevail"). The Court voided the broadcasting ban, concluding that it was not closely related to the powers conferred on the States by the Twenty-first Amendment to regulate importation or sale of liquor. *See id.* at 715. But, as with *Hostetter* and *Midcal*, the Court confirmed that when a State regulates within the literal terms of the Twenty-first Amendment, the State is acting with full authority. *See Crisp*, 467 U.S. at 712 ("The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquors within their borders. . . . Indeed, '[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause'") (quoting *Craig*, 429 U.S. at 206).[3]

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[3] *Accord North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (upholding North Dakota's reporting and labeling regulations as a valid exercise of that State's Twenty-first Amendment

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Petitioners also mistakenly rely on a line of cases in which the Court struck down liquor price affirmation statutes under the Commerce Clause. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986) (striking down New York statute that required liquor distillers to sell to wholesalers at a price no higher than the lowest price the distiller charged wholesalers anywhere else in the United States); *Healy v. Beer Inst.*, 491 U.S. 324, 341-42 (1989) (striking down Connecticut statute that required out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers were, as of the moment of posting, no higher than the prices at which those products were sold in bordering states). Like *Hostetter*, those cases are inapposite because the challenged statutes regulated sales in other states and, therefore, did not fall within the State's express Twenty-first Amendment powers to regulate within its own borders.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the last case relied upon by Petitioners, *see* Pet. Br. at 35-37, also did not involve a State's exercise of its express Twenty-first Amendment powers. There, the Court invalidated on dormant Commerce Clause grounds a Hawaii statute that exempted locally-produced liquor from a wholesale tax. *See Bacchus*, 468 U.S. at 265. As in *Crisp*, the Court asked "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [local] exemption," or, put another way, whether the local

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powers: "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system") (citing *Midcal*, 445 U.S. at 110).

exemption is "closely related to the powers reserved by the Twenty-first Amendment." *Id.* at 275.

The Court answered these questions in the negative. In what seems almost a visceral reaction to Hawaii's admitted desire to favor a local industry, *see id.* at 266, the Court simply held that "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276; *see also id.* (noting that the "central purpose of the [Twenty-first Amendment] was not to favor local liquor industries by erecting barriers to competition").

In stark contrast to Hawaii's statute, New York's direct shipment statute regulates the "importation" of alcohol beverages – a subject matter within the literal language of the Twenty-first Amendment – rather than the taxation of locally-produced liquor. And, unlike Hawaii's statute, which served only economic protectionism, New York's statute is designed to combat the "perceived evils of an unrestricted traffic in liquor," particularly underage consumption. *See* Point III, *infra*. Thus, *Bacchus* is no more helpful to Petitioners than any of the other cases upon which they rely because it, too, did not involve a State's exercise of its express Twenty-first Amendment powers.

Importantly, *amicus* is not suggesting that the States' exercise of their express powers under the Twenty-first Amendment is without limitation. As this Court has held, state regulations of alcohol beverages may be struck down when those regulations conflict with constitutional provisions other than the Commerce Clause. *See, e.g., 44 Liquormart*, 517 U.S. 484 (First Amendment); *Craig*, 429

U.S. 190 (Equal Protection). But even in those cases, the Court described the States' Twenty-first Amendment powers over the "importation of intoxicants" as a "regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Craig*, 429 U.S. at 207.

In sum, this Court consistently has held that when a State exercises its express Twenty-first Amendment powers, it is immune from a dormant Commerce Clause attack. Petitioners do not and cannot identify a single decision that contradicts this principle. Indeed, the decisions upon which they rely only serve to reinforce that rule of law, which is dispositive in this case.

III. THE SECOND CIRCUIT CORRECTLY HELD THAT NEW YORK'S DIRECT DISTRIBUTION LAW IS CONSTITUTIONAL

New York's direct distribution law fits squarely within the ambit of the Twenty-first Amendment. It regulates the importation of alcohol beverages into the State for use within the State. *Cf. Crisp*, 467 U.S. 691; *Midcal*, 445 U.S. 97. The law was not passed for the exclusive purpose of protecting the local wine market. *See Swedenburg v. Kelly*, 358 F.3d 223, 237 (2d Cir. 2004) ("[W]e find no indication . . . that the regulatory scheme is intended to favor local interests over out-of-state interests"); *cf. Bacchus*, 468 U.S. 263. It does not regulate commercial activity occurring entirely outside the State. *Cf. Healy*, 491 U.S. 324; *Brown-Forman Distillers*, 476 U.S 573 (1986). And it does not encroach upon rights protected by other provisions of the Constitution. *Cf. 44 Liquormart*, 517 U.S. 484; *Craig*, 429 U.S. 190; *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S.

341 (1964). As such, the Second Circuit correctly held that the New York law – as an exercise of the State's express Twenty-first Amendment powers – withstood Petitioners' dormant Commerce Clause challenge. *See Swedenburg*, 358 F.3d at 238-39; *see also Young's Mkt.*, 299 U.S. at 62.

Further, even if the Second Circuit had needed to consider the dormant Commerce Clause, its decision to uphold the New York statute still would have been correct. As a threshold matter, the New York law does not discriminate against out-of-state wineries and, therefore, does not implicate dormant Commerce Clause concerns. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"), *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). The law provides that any alcohol beverages sold to consumers in New York, whether produced within or without the State, must pass through parties licensed by the State Liquor Authority. *See* ABC Law §§ 100(1), 102(1)(c); *Swedenburg*, 358 F.3d at 237-38 ("New York treats wine importers the same as it treats internal sellers").

The record also demonstrates that New York's wine market does not prejudice out-of-state wineries. *See* JA 127 (Affidavit of Howard P. Kitt, dated August 16, 2001) ¶ 78 (evaluating competition in the New York wine market and concluding that, "by any reasonable economic test, the wine market in New York State is one in which competition is open, intense, and effective, and in which access – for both suppliers of wine and consumers of wine – is unimpeded"). In light of New York's nondiscriminatory regulations, Petitioners' argument is revealed for what it

really is: Petitioners simply do not want to comply with New York's regulations.

Putting aside the threshold inquiry, New York's direct distribution law would satisfy the higher burden that, in Petitioners' incorrect view, *see* Pet. Br. at 16-18, *Bacchus* imposes on those state laws that discriminate against interstate commerce. That hypothetical higher burden would require that the interests implicated by the state regulation be "so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail," notwithstanding that the regulation conflicts with federal law. *Crisp*, 467 U.S. at 714.

State regulations that are integral to enforcing that State's liquor laws must be deemed "closely related" to the Twenty-first Amendment. For example, in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972), the Court held that a South Carolina regulation that required out-of-state liquor manufacturers to have a representative resident within the State to receive alcohol beverage shipments in-state on behalf of the manufacturer was "unquestionably, reasonably related to the State's purpose" of enforcing the State's ABC law, which was a legitimate Twenty-first Amendment goal. *Id.* at 283 ("By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records").[4]

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[4] *See also North Dakota*, 495 U.S. at 432 (plurality opinion) (holding that labeling and reporting requirements were "necessary components" of an "unquestionably legitimate" "regulatory regime" designed to ensure that liquor destined for a federal enclave within a State was not diverted into the State); *Midcal*, 445 U.S. at 107 ("[T]he Amendment gives the States control over the 'transportation or importation' of liquor into their territories. Of course, such control

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As with the regulation at issue in *Heublein*, New York's direct distribution law is integral to enforcing the State's ABC Law. In approving the physical presence requirement that is part of the direct distribution law, the Second Circuit stated:

> Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by [State Liquor Authority (the "SLA")] officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license holders are required to post. . . . Requiring New York officials to traverse the country to ensure that direct sales to consumers . . . comply with New York law would render the regulatory scheme useless.

Swedenburg, 358 F.3d at 237-39 (footnote omitted). *See also* JA 161 (Affidavit of Thomas G. McKeon, General Counsel of the New York State Liquor Authority, dated August 17, 2001) ¶ 4 ("If out-of-state wineries . . . are permitted to sell and ship directly to New York consumers – without any licensee – the SLA will lose the ability to investigate and control such shipments, to protect against diversion of wine to unlawful purchasers (such as minors below the drinking age) and to insure that alcoholic beverages sold in this State are not adulterated"); JA 98-101 (Kitt Aff.) ¶¶ 39-42 (stating that out-of-state wineries (*i.e.*, those with no physical presence in New York) have less incentive to comply with New York regulations than in-state wineries). Therefore, as in *Heublein*, the physical

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logically entails considerable regulatory power not strictly limited to importing and transporting alcohol").

presence requirement of New York's direct distribution law is "unquestionably, reasonably related to the State's purpose" of enforcing its ABC Law. 409 U.S. at 283.

Moreover, regulations aimed at promoting temperance also must be deemed "closely related" to the Twenty-first Amendment. *North Dakota*, 495 U.S. at 432 (approving North Dakota regulation that promoted temperance). The New York law clearly promotes temperance among minors. As one expert testified below:

> Unlike out-of-state producers and sellers of alcoholic beverages who are beyond the jurisdiction of New York State regulations, in-state entities licensed by the State Liquor Authority to traffic in alcoholic beverages face civil and criminal sanctions if they fail to comply with New York's alcoholic beverage control laws. . . . If the requirement that all out-of-state alcoholic beverages be imported through in-state licensed wholesalers were to be struck down, the practical means of enforcing the regulations would be lost, and any unlicensed out-of-state producers or sellers of alcoholic beverages would be able to sell to minors with impunity.

See JA 165 (Decl. of Frederick P. Schaffer, dated August 17, 2001) ¶¶ 8, 10. *See also Granholm v. Heald*, Case Nos. 03-1116 & 03-1120, at 9-10, 13 (U.S. Jan. 29, 2004) (brief of *amicus curiae* Michigan Association of Secondary School Principals, *et al.*) (reviewing underage drinking sting operation in Massachusetts, Michigan, and Tennessee that demonstrated the ease with which minors can purchase alcohol beverages sold over the internet without providing proof of age). For this additional reason, even if the dormant Commerce Clause were relevant here, and even if

Petitioners' new "closely related" test were controlling, the Second Circuit correctly upheld the New York statute.

IV. AN AFFIRMANCE OF THE SECOND CIRCUIT'S DECISION WILL PRESERVE THE "UNQUESTIONABLY LEGITIMATE" THREE-TIER DISTRIBUTION SYSTEM

After ratification of the Twenty-first Amendment, the majority of States, including New York, established a three-tier structure to regulate alcohol beverages: alcohol must pass from a producer to a wholesaler, from a wholesaler to a retailer, and from a retailer to a consumer. *See* ABC Law § 102(1)(c)-(d); Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment*, 95 Va. L. Rev. 353, 355-56 (1999). The three-tier structure promotes orderly commerce, tax collection, and control (over, for example, distribution to minors). *See* JA 146 (McKeon Aff.) ¶ 10 ("[T]he three-tier system is designed to . . . establish and maintain balanced, orderly markets for the distribution and sale of alcoholic beverages"); JA 152 (McKeon Aff.) ¶ 26 (stating that the three-tier system is intended "to establish a level playing field of evenhanded competition which provides each licensee with a fair opportunity for economic success, but which avoids the public evils caused by destructive competition in the sale of alcoholic beverages"). As the General Counsel of the New York State Liquor Authority has said, "[t]he three-tier system is the critical foundation of the regulatory scheme established by the State in 1934 and continued without interruption ever since." *See* JA 146 (McKeon Aff.) ¶ 10.

This Court has endorsed the three-tier structure. In *North Dakota*, 495 U.S. at 431-33, the Court stated: "In

the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate."

In resolving this case, the Court should do no harm to the longstanding and highly beneficial three-tier system. More to the point, reversal here could threaten this "unquestionably legitimate" structure because the Petitioners challenged not just the physical presence requirement of New York's law that purportedly favors in-state wineries, but the broader, three-tier structure. *See Swedenburg v. Kelly*, Case No. 00 Civ. 778 (RMB) (S.D.N.Y. Dec. 10, 2002); JA 143-44 (McKeon Aff.) ¶ 2 (noting that the plaintiffs challenge ABC Law § 102(a) & (c)).

The Court of Appeals for the Fourth Circuit recently recognized the gravity of such a challenge. *See Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). Although the Fourth Circuit incorrectly held that North Carolina's direct distribution statute violated the dormant Commerce Clause, the court limited its remedy to striking the statutory preference for in-state wineries, while leaving intact the statutory prohibition against out-of-state direct distribution. *See id.* at 517-20. The court held that "when presented with the need to strike down one or more of those laws as unconstitutional, we can assume that North Carolina would wish us to take the course that least destroys the [three-tier] scheme that it has put into place pursuant to its powers under the Twenty-first Amendment." *Id.* at 519.

Consequently, if the Court were to reverse the Second Circuit's decision, it should instruct the lower court to

strike only the provisions of New York's law that purportedly provide an advantage to in-state wineries, rather than strike those provisions that underpin the three-tier structure. In any event, *amicus* submits that the Court should not need to reach that juncture because New York's law is a valid exercise of the State's express Twenty-first Amendment powers.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court affirm the decision of the Court of Appeals for the Second Circuit. Should the Court reverse, *amicus* respectfully requests that the Court direct the lower court to fashion a remedy that does the least harm to New York's three-tier structure of alcohol beverage regulation.

Respectfully submitted,

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Nos. 03-1116, -1120 and -1274

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM,
GOVERNOR OF MICHIGAN, *et al.*, *Petitioners*,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

JUANITA SWEDENBURG, *et al.*, *Petitioners*,
v.
EDWARD D. KELLY, CHAIRMAN,
NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
STATE LIQUOR AUTHORITY, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION IN SUPPORT OF PETITIONERS IN *GRANHOLM* AND RESPONDENTS IN *SWEDENBURG*

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

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CONSENT TO FILE

Consents to the filing of any *amicus* briefs in each of the consolidated cases were filed by the parties on July 9, 2004, July 13, 2004 and July 14, 2004.

INTEREST OF *AMICI*[1]

The Illinois Alcoholism and Drug Dependence Association (IADDA) is an Illinois-based not for profit established in 1967. IADDA is involved in professional training, career development and advocacy for providers in the field of alcohol and drug dependency prevention, counseling and diversion. IADDA represents more than 100 prevention and treatment agencies. A list of its members is attached in the Appendix.

IADDA advocates for sound public policy to foster healthier families and safer communities. Its objectives are to work for effective treatment for addicted or drug-dependent people and for prevention, particularly among youth. Its public policy advocacy works to promote healthier individuals and safer communities by helping avoid the problems of dependence.

IADDA partners with two prevention programs. One, Illinois Teen Institute, operates an acclaimed prevention and positive peer influence program directed at teenagers. It involves youth in community planning for prevention of addiction and dependence. Its sponsored program, Teens Reaching For And Achieving Excellence (TRAX) involves teen leaders workshops around the state to

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[1] Neither party's counsel authored any portion of this brief. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

prepare them and involve them in the anti-dependence and prevention drives. The other program, Operation Snowball, creates youth/adult partnerships to fight against use and dependence on tobacco, alcohol, and other drugs. Operation Snowball has 150 chapters working to involve communities in healthy decisionmaking.

IADDA maintains a web site linking both dependence providers and those involved in its affiliate efforts to government. http://www.iadda.org. The site facilitates access to the Illinois General Assembly, regulatory agencies, and welfare policymakers.

SUMMARY OF ARGUMENT

The Constitutional law approach to the issue of direct shipping advocated by the Sixth Circuit treats liquor like any other commodity, the untrammeled trade of which should be promoted and protected by the Commerce Clause. Such an approach is at variance with the national welfare, public opinion, and the plain language of the Twenty-First Amendment to the United States Constitution.

It is indisputable that liquor is a dangerous drug and the drug that imposes the highest social and economic costs on American society. Many authorities, including those relied upon by direct shipping advocates, recognize that states legitimately may use taxes and other regulatory measures to promote temperance and curb alcohol abuse. Particularly now with the explosive growth of Internet sales, the Sixth Circuit's approach will wreak havoc on a state's abilities to regulate and control access to this dangerous drug.

ARGUMENT

I. The Commerce Clause Has Underpinned A Strong American Economy, But Its Unfettered Application Is Not Appropriate As To Liquor

Under the Articles of Confederation that preceded the United States Constitution, import-export duties and regulations hindered the development of a national economy. *See* Adam Badawi, *Uneasy Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331 (2003). The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, has been a major force in creating a national free market. The Commerce Clause not only expressly conveys to Congress the power to regulate interstate trade, but has long been accepted as denying that power to state governments by negative implication. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349 (1994).

As the authorities cited by the parties in the cases now before this Court on writ of *certiorari* make clear, a notable exception to the plenary authority of Congress under the Commerce Clause is the authority -- however broad or narrow -- to regulate liquor granted to the states by Section 2 of the Twenty-First Amendment of the Constitution.

Some commentators and some decisions have found further cause or function for the negative implication of the Commerce Clause. *See, e.g.*, Douglas Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 Utah L. Rev. 111, 131 (2004). Arguing that it provides a useful tool for invalidating protectionism or special interest legislation, they contend it has been invaluable in fostering a free market in the United States and that largely because of it,

American consumers get minimum prices and optimum economic performance. By placing the interstate portion of the economy beyond the interference of much state government regulation, the Constitution has facilitated a more *laissez-faire* economic system.

The parties opposing direct shipping laws make no attempt to hide the fact that they seek to promote and protect their ability to make liquor as widely and cheaply available as possible. In their Brief in Opposition to the Petitions for Writs of Certiorari, the Respondents in the Sixth Circuit cases open and close with references to and repeatedly cite a Report by the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 5* (July 2003) ("Report"). In the Report the staff concludes:

> states could significantly enhance consumer welfare by allowing direct shipment of wine to consumers. Through direct shipping, online wine sales offer consumers lower prices and greater selection.

Id. at 3.

There is more to the issue before this Court than free trade, however. The fact that nearly 40 state attorneys general have added their voices in favor of alcohol regulation and against open shipping testifies to that.

The American public does not believe that minimum pricing and maximum consumption is desirable for all commodities and all industries. Congress in some cases has responded to that public concern by banning or tightly regulating the commodity with Commerce Clause authority. Heroin is an example. *See* 21 U.S.C. § 841.

Alcohol is an even better example. Congress twice has placed before the states constitutional amendments to

regulate alcohol as an alternative to exclusive Commerce Clause regulation. Both were ratified by the states and both dealt with alcohol. The Eighteenth Amendment introduced Prohibition and banned alcohol. The Twenty-First Amendment repealed Prohibition and granted regulatory authority to the states over the transportation or importation of alcohol.

Courts have recognized the power of states to ban alcohol totally, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000), to permit political subdivisions to ban it, *Allstate Beer, Inc. v. Julius Wile Sons & Co., Inc.*, 479 F. Supp. 605 (N.D. Ga. 1979), and to ban it at specific times or in particular places. *Levendis v. Cobb County*, 250 S.E.2d 460, 242 Ga. 592 (Ga. 1979); *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurant, Inc.*, 669 P.2d 265, 1983 Ok. 77 (Ok. 1983).

Most Americans do not want to maximize the availability and consumption of alcohol by minimizing price. In a 2003 national poll by Wirthlin Worldwide, 83% of respondents agreed that Internet sales should not be allowed because they would give minors easier access to alcohol. *New Survey Confirms Majority of Americans Oppose Internet Alcohol Sales*, Oct. 22, 2003, *at* http://www.cheaphostingdirectory.com/news/20031022alcohol. (citing a 2003 WirthlinWorldwide survey). 77% of Americans oppose permitting direct sales of alcohol by Internet or mail, as do 71% of self-identified alcohol consumers, and 85% of non-drinkers. *Id.* In Texas during 2000, a poll found that 71% disagreed with the statement: "Manufactures of any product including alcoholic beverages, should have the right to sell directly to consumers over the Internet." *The Three-Tier System: Texans Overwhelmingly Reject Direct Shipment of Alcohol* (2000), *at* http://www.texassafetynetwork.org/internet/three/survey.htm

(citing a statewide public opinion poll). In Chicago, Illinois, 24 partial and 16 full precincts have voted to go "dry" since 1992. Mayor Richard Daley has noted that a "bad liquor establishment can tear the fabric of a neighborhood and send it into decline." Chicago Magazine, *The Dry Season*, July 2003.

As the foregoing illustrates, prudent use is a more favored social objective than wide-open access where liquor is concerned. This should be recognized in evaluating the competing schemes of legal analysis for state regulation of alcohol.

The Report acknowledges that "some states may explicitly pursue a policy of elevating prices above competitive levels to promote temperance." *Id.* at 26-27. In fact, the National Academy of Sciences has recommended that "Congress and state legislatures should raise excise taxes to reduce underage consumption ..." Report of the National Academy of Sciences, *Reducing Underage Drinking: A Collective Responsibility* at 11 (September 2003) *at* http://www.marininstitute.org/alcohol_policy/UnderageDrinking_Exec_Summary.

A 2002 article summarizing the economic research on the effect of price on alcohol consumption found that:

> This research, which has used a wide variety of data, generally has concluded that increases in the price of alcoholic beverages lead to reductions in drinking and heavy drinking as well as in the consequences of alcohol use and abuse.

Frank J. Chaloupka *et al.*, *The Effects Of Price On Alcohol Consumption and Alcohol-Related Problems*, 26 Nat'l. Acad.

Sci. 1, 22 (2003). One of the studies commended in the review found:

> After controlling for State and year effects, the investigators concluded that a $1 increase in the per gallon liquor tax can reduce gonorrhea rates by 2.1 percent; furthermore a beer tax increase of 20 cents per six-pack can reduce gonorrhea rates by 8.9 percent. Similar, or even somewhat larger, effects of liquor and beer taxes were found for syphilis rates.

See id. at 30.

II. Alcohol Is Responsible For More Social And Economic Damage To The American Public Than All Other Drugs Combined.

Statistics on violence, divorce, crime, fetal alcohol syndrome, spousal and child abuse, DUI killings and maimings, and lost work time clearly demonstrate the terrible social and economic cost our society pays for the imprudent use of alcohol.

The economic cost of liquor abuse in America is estimated at $185 billion, while that for illicit drugs is estimated at $161 billion. Underage drinkers and adult excessive drinkers account for an aggregate 50.1% of total alcohol consumption in the United States. Glen R. Hanson & Ting-Kai Li, *Public Health Implications of Excessive Alcohol Consumption*, 289 JAMA 8, 1031 (Feb. 26, 2003). Approximately one-third of U.S. adults exceed the guidelines defining excessive consumption. *Id.* at 1032. A recent Illinois state government survey found that 10% of eighth graders and 36% of twelfth graders reported binge drinking. Press Release, *Governor Blagojevich Calls for More Federal Funding to Prevent the Dangers of Binge Drinking: Study Shows Heavy Drinking Isn't Just on College Campuses*

(April 7, 2004). The Report that the direct shipping advocates repeatedly cite confirms what should be sobering statistics on youth access to alcohol:

> In 2002 approximately 68% of eighth graders, 85% of tenth graders, and 95% of twelfth graders said that it is "fairly easy" or "very easy" to get alcohol. Underage alcohol use imposes significant costs, in both human terms and economic terms. Although the numbers are very difficult to quantify, one study estimated that, in 1996, the total cost of underage drinking—including traffic crashes, violent crimes, burns, drowning, suicide attempts, fetal alcohol syndrome, alcohol poisoning, and treatment—was $52.8 billion.

Id. at 11.

Those numbers are significant for many reasons. Alcohol is associated with violence. The National Institute on Alcohol Abuse and Alcoholism (NIAA) has found that:

> Excessive alcohol consumption is frequently a factor in violence toward women. These events range from being the recipient of verbal aggression . . . to battery, rape, and death. Recent findings among women who reported sexual assaults include higher levels of alcohol consumption, both their own and the perpetrators, and sexual risk-taking.

NIAA, *Strategic Plan 2001-2005* at 20 *at* http://www.niaa.nih.gov. 50-60 % of male alcoholics report violent behavior toward women. *Id.*

Further, "[a]lcohol abuse is associated with high-risk sexual behavior and injection drug use, two of the major modes of human immunodeficiency virus transmission."

Hanson & Li, *supra*, at 1031. *The Christian Science Monitor* noted in a report on underage drinking that:

> experts say (sex) . . . is a factor advertisers exploit, often to the detriment of girls more than boys. 'Bad girls make good company,' reads one ad for Cuervo rum. In a Martell Cognac ad, a sultry woman is on display with a plea to 'be at least capable of bad.'

New Face of Underage Drinking: Teenage Girls, Christian Science Monitor, July 13, 2004.

The adverse impact of alcohol on the young is well-established. Drinking increases "the chances that teenagers will become adult heavier drinkers with alcohol problems later in life". Susan E. Foster, et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289 JAMA 8, 989 (Feb. 26, 2003); B.F. Grant & D.A. Dawson, *Age of Onset of Alcohol Use and its Association with DSM-IV Alcohol Abuse and Dependence: Results from the National Longitudinal Alcohol Epidemiological Survey*, J. SUBSTANCE ABUSE, 9, 103-110 (1997). Prenatal contact with alcohol is highly detrimental: "We found more serious cognitive impairment in relation to alcohol than cocaine or other drugs, including marijuana or smoking" (Dr. Sandra Jacobson, Wayne State University). Linda Carroll, *Fetal Brains Suffer Badly from Effects of Alcohol*, N.Y. Times, Nov. 4, 2003, available at http://www.nytimes.com/. "Fetal alcohol syndrome, a serious disorder affecting brain function, is the leading preventable birth defect in the U.S." *Id.*

III. Illinois' Liquor Law Is Designed To Regulate Imported Liquor

Illinois is home to many large liquor retailers, such as Sam's Wine & Spirits, Binny's, and Walgreen's. Illinois, however, has relatively few wineries and distilleries and no major breweries, so a very high percentage of the alcohol sold is imported. Illinois law looks to and derives its authority from the Twenty-First Amendment. For example, the direct shipping provision of the Illinois Liquor Control Act of 1934 provides:

> Pursuant to the Twenty-First Amendment of the United States Constitution allowing states to regulate the distribution and sale of alcoholic liquor and pursuant to the federal Webb-Kenyon Act declaring that alcoholic liquor shipped in interstate commerce must comply with state laws, the General Assembly hereby finds and declares that selling alcoholic liquor from a point outside this State through various direct marketing means, such as catalogs, newspapers, mailers and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor; to State revenue collections; and to the economy of this State.

235 Ill. Comp. Stat. 5/6-29.1 (1934). *See also* Illinois Beer Industry Fair Dealing Act, 815 Ill. Comp. Stat. 720/2 ("This Act is promulgated pursuant to authority of the State under the provisions of the Twenty-First Amendment to the United States Constitution ..."); *Erfor Corp. v. State of Illinois Liquor Control Commission*, 47 Ill. App. 3d 72, 361 N.E.2d 776 (Ill. App. Ct. 1977) ("The source of state power to control alcoholic beverages is the police power as fortified by the twenty-first amendment of the United States Constitution.")

In Illinois, retailers must determine age eligibility, observe operating hours, halt bawdy conduct and gambling, prevent disorderly conduct, and must not intoxicate patrons. 235 Ill. Comp. Stat. 5/6-16; *Spiros Lounge, Inc. v. State of Illinois Liquor Control Commission*, 423 N.E.2d 1366, 1372, 98 Ill. App. 3d 280, 287 (Ill. App. Ct. 1981) (sales to minor justified revocation); *Jager v. Illinois Liquor Control Commission*, 392 N.E.2d 176, 182, 74 Ill. App. 3d 33 (Ill. App. Ct. 1979), (repeated altercations as grounds for revocation); *Show of Shows, Inc. v. Illinois Liquor Control Commission*, 230 N.E.2d 268, 271, 86 Ill. App. 2d 109 (Ill. App. Ct. 1967) (solicitation of drinks by female employee warranted revocation); *Daley v. Jack's Tivoli Liquor Lounge*, 254 N.E.2d 814, 819, 118 Ill. App. 2d 264 (Ill. App. Ct. 1969) (sexual solicitation of police officer by prostitute vouched for by bartender warranted revocation); *Daley v. Rifkin*, 228 N.E.2d 224, 226, 84 Ill. App. 2d 467 (Ill. App. Ct. 1967) (evidence that bartender steered patron to prostitute justified revocation).

An Illinois importing distributor must be licensed as a distributor. 235 Ill. Comp. Stat. 5/5-1(c). An importing distributor must hold received alcohol in his warehouse from receipt until delivery to a retailer. 235 Ill. Comp. Stat. 5/6-8. A tax measured by volume is imposed on importing distributors and must be paid within 15 days of the month following delivery to a retailer. 235 Ill. Comp. Stat. 5/8-1; 235 Ill. Comp. Stat. 5/8-2. A distributor may only deliver to a licensed retailer. 235 Ill. Comp. Stat. 5/1-1(b).

Common carriers delivering alcohol into Illinois are required to file shipment manifests with the Illinois Liquor Control Commission. 235 Ill. Comp. Stat. 5/8-12. Consequently, reconciliation of the manifest information with the distributor tax filing and the warehouse inventory creates a fail-safe system for tax collection. If manifested product is

not in the inventory, it has been delivered and tax is due. 235 Ill. Comp. Stat. 5/8-2. Further, the tax document verifies that the distributor is only selling to retailers, not consumers, because the retailer must remit the sales tax to the state, accounting for the product. 235 Ill. Comp. Stat. 5/8-14. This distribution system means that sales to consumers go through licensed retailers and, as set forth above, Illinois polices retailers by inventory control to assure that taxes are paid and that sales are not made to minors or in furtherance of undesirable conduct.

Illinois permits some limited direct shipment to Illinois consumers, 235 Ill. Comp. Stat. 5/6-29, while maintaining a general prohibition. 235 Ill. Comp. Stat. 5/6-29.1. Retail inventory control is a regulatory scheme which serves to limit youth access.

IV. This Case Will Have A Substantial Impact On The Ability Of Illinois And Other States To Maintain Control Of Imported Alcohol

This Court now has before it decisions by the Second Circuit and the Sixth Circuit Courts of Appeals that take radically different views of the authority to regulate the importation of intoxicating liquor granted to the states by the Twenty-First Amendment and of the interplay between the Twenty-First Amendment and the dormant Commerce Clause. The very basis of their analyses differs.

The Second Circuit essentially looks at the scope of authority granted by the Twenty-First Amendment and allows states to regulate the importation of liquor in any rational fashion within that scope.

The Sixth Circuit, however, employs a two-step approach, starting with a dormant Commerce Clause analysis

and, if the state statute fails to pass a "strict scrutiny" test, proceeding on to determine whether the statute is somehow "saved" by the Twenty-First Amendment.

The Sixth Circuit approach effectively reduces the Twenty-First Amendment to surplusage and prevents a state from regulating alcohol in a fashion any stricter than it may regulate other goods in interstate commerce.

Consider:

- An out of state Internet seller with no physical presence in Illinois sells directly to an Illinois liquor retailer. Under the current law requiring physical presence to establish Commerce Clause nexus with a taxing state, the State of Illinois has no ability to impose a sales or use tax on the seller. *See Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992); *National Bellas-Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967). The state loses not only revenue, but the ability to use high taxes to depress consumption. Furthermore, the state must deploy more resources or divert existing resources to ensure that only licensees are selling, and selling within the limits of the law.
- Under Illinois law, a distributor must operate a strictly controlled warehouse. The inventory can be ascertained by the deliveries made and reported from the common carrier delivery manifests. The distributor pays a tax when product at the warehouse is delivered to a licensed retailer. However, if an Illinois distributor were to purchase product over the Internet and have it delivered directly to the retailer, tracking, regulating and taxing the product would become infinitely more difficult for the State. An untraceable, unidentified supply of liquor will

encourage failure to pay tax and lower prices, making liquor more accessible to minors.

According to a July 2004 report released by the National Governor's Association and the National Conference of State Legislators, sales over the Internet topped $104 billion in 2003, a nearly 40% jump over the previous year. *See* Forrester Research, Inc., *The Growth Of Multichannel Retailing*. The volume of sales over the Internet has grown exponentially in the years since this Court last interpreted the Twenty-First Amendment. There is no reason to think that growth will not continue.

This is undoubtedly true with respect to alcohol sales to minors, as well. A 2000 poll by Americans for Responsible Alcohol Awareness found 80% of college students say their peers are likely to purchase alcohol over the Internet, as no age verification is required. *National Survey: 80% of College Students Say Peers Likely to Purchase Alcohol Online* (April 4, 2000) *at* http://www.texassafetynetwork.org/news/reporter/eightypercent. Volume alone will render it increasingly hard for state's to prevent and police such sales.

V. The *Swedenburg* Analysis Facilitates State Efforts To Control Improper Alcohol Use

The Second Circuit's approach in *Swedenburg* requires state liquor control schemes to be rational exercises of power pursuant to the purpose of the Twenty-First Amendment. It necessarily looks to a state's regulatory structure to find meaning for any particular component subject to challenge.

The Sixth Circuit's logic in *Granholm* starts by treating liquor the same as if it were any other commodity,

like autos, milk, or furniture. If it finds discriminatory treatment of out-of-state-sourced liquor, it defaults to Commerce Clause strict scrutiny.

The Sixth Circuit approach is inconsistent with the language of the Twenty-First Amendment prohibiting importation in violation of the state's laws and ignores the overwhelming medical and economic evidence that liquor is the dangerous drug most affecting American society. Furthermore, it flies in the face of the explosive development of a new distribution technology that threatens to swamp efforts at liquor regulation, the Internet.

Illinois predicates its liquor tax collection system on distributor collection and payment. The Internet can go around it. Under the Sixth Circuit approach, perhaps Illinois could find a way to collect the tax from out-of-state sources. But it would succeed only if *Quill* does not apply, if Congress permits, if presence is not required, and if the Internet shipper can actually be found. It makes a high tax/lower consumption strategy for liquor control virtually a dead letter.

Collection from in-state sources will be more difficult if not impossible. A state cannot police its sales tax collections if Internet delivery to retailers becomes physically possible. The suggestion that the state do more physical audits comparing inventory to sales tax remissions and distributor delivery reports is unrealistic. Illinois has 25,000 retail liquor licensees. Constant physical surveillance of retail sites is not a feasible enforcement option. Physical surveillance of cyberspace is virtually impossible.

If a state predicates underage distribution control on retail carding to determine eligibility, it still may be able to impact diversion to minors if direct shippers are physically

present in the state because the state has much more intimate supervision of how the shippers conduct business. Internet sites can open and close in a click.

Currently, the circuits are split on direct sales of liquor. An Internet industry in liquor looms. Illinois, like other states, has a system that uses inventory controls to tax and monitor retail sales. Undermining the tools of control will not help. Imposing Commerce Clause strict scrutiny for a test of Twenty-First Amendment rational purpose will promote uncontrolled, unregulated liquor sales. If states can effectively regulate the development of this industry, the political branches of government may devise a strategy for dealing with this dangerous product.

CONCLUSION

The judgment of the Second Circuit Court of Appeals in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) should be affirmed and the judgment of the Sixth Circuit Court of Appeals in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) reversed.

Dated: July 29, 2004

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In The

Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF MILLBROOK VINEYARDS & WINERY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Millbrook Vineyards & Winery (hereinafter "Millbrook"), appearing as *Amicus Curiae* herein, is an award-winning small winery located in the Hudson River region of New York State. Millbrook is duly licensed as a commercial winery in New York State. Millbrook's wines have received high acclaim but because of its limited production, Millbrook has found it difficult to achieve national distribution. Millbrook is interested in selling, and directly shipping its fine wines to out-of-state wine-lovers, many of whom have visited the winery and desire to purchase them through direct orders by mail, telephone and the internet, as customers from New York do all year long. Millbrook has advocated open direct shipping for many years. In addition, if New York opened direct shipping to non-New York wineries, then, through reciprocity provisions in other states, Millbrook would be able to direct ship to such other states.

SUMMARY OF THE ARGUMENT

Respectfully, we contend that the Second Circuit felt unduly constrained in concluding that its analysis should not substantively consider the actual discriminatory impact on non-New York wineries, compared to New York

[1] Pursuant to United States Supreme Court Rule 37, counsel of record has filed letters with the Clerk of Court consenting to the filing of this brief. In conformity with Supreme Court Rule 37.6, *Amicus* states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *Amicus*, its members and its counsel made a monetary contribution to the preparation and submission of the brief.

wineries, of New York's statutory scheme. We submit this Brief to detail those real-world discriminations, which the Court below hinted at but felt constrained to disregard, discriminations which ineluctably flow from the statute's differential treatment of in-state and out-of-state wineries. We also seek to illuminate the concrete obstacles to commerce by out-of-state wineries imposed by the innocuous-sounding abstract "physical presence" requirement articulated below.

New York statutes require non-New York wineries to double-ship wine, first shipping to a New York consignee and then from that consignee to the consumer; if that costly burden were not enough, the law places other material delivery restrictions on non-New York wineries only. The aforementioned consignee must not only be licensed, but also meet a host of significant and costly requirements the Court below blithely summarized as "physical presence." Further, palpable clouds hover over any potential market opening for non-New York wineries because they are apparently barred from credit card transactions so commonplace in every other area of modern commerce. In contrast to these burdens on non-New York wineries, New York wineries are favored with a plethora of special privileges, only one of which was focused on by the Court below.

Even allowing for the 21st Amendment's grant of authority to states, the same powerful reasons for this Court's traditional "strict scrutiny" of discriminations against out-of-staters that apply in other cases, such as the material fact that out-of-staters cannot vote in New York and cannot thereby restrain impolitic legislation,

should apply in this case.[2] The synergistic impact of the discriminations herein is conspicuous, and if Constitutional analysis may simply ignore them, all fifty States could then impose restrictions similar to New York's with impunity, multiplying these obstacles to free National commerce fifty-fold.[3]

ARGUMENT

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905) (unanimous opinion, by Holmes, J.)[4]

Preface

We submit that the Second Circuit's analysis below mistakenly assumed that it was immaterial whether New York's statutory regime in fact made it impossible for out-of-state wineries to comply and be able to ship wine to willing New York consumers. Discriminations in interstate commerce can no more be an "ivory tower" notion than Commerce can be. The Circuit's "ivory tower" approach to

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[2] *See* note 12 *infra*.

[3] Practicalities of selling in every state aside, a winery has a right to sell its wine in all fifty states on the same terms as wineries in those states, and it cannot be assumed that there are not wineries that would sell in all fifty states if given a non-discriminatory opportunity. As the Second Circuit noted, "In 2000, there were over 2,100 wineries in the country, a 275% increase since 1975." *Swedenburg*, *supra*, 358 F. 3d at 239 (2d Cir. 2004).

[4] *See also United States v. Lopez*, 514 U.S. 549, 572 (1995) (concurring opinion).

the Constitutional question is exemplified by the observation that:

> Appellees did present some evidence of a general nature with regard to projected costs that an out-of-state winery would incur in obtaining a New York license. They argue those projected costs justify their decision not to pursue a New York license. We find those projections to be of little use, and they are certainly not determinative. Appellees do not contend the requirements for licensing are somehow arbitrary or unrelated to the state's desire to regulate the industry. They simply argue the costs are too high to warrant entry into the market.

Swedenburg v. Kelly, 358 F. 3d 223, 238 n.12 (2d Cir. 2004). But it is puzzling how the Circuit could actually find that while New York's statutory regime impinges upon out-of-state wineries, the "scheme does so in a non-discriminatory manner" *id.* at 239, while eschewing the need or even propriety of examining the specific real-world discrimination. We respectfully submit that it is a puzzle without a satisfactory answer in the opinion below. Could such a scheme be constitutional if in fact its burdens and costs were too high for any actual out-of-state winery to enter the market? Is it not telltale that the State's own affiant, State Liquor Authority General Counsel McKeon (hereinafter "McKeon") conceded that, in fact, *no* out-of-state winery has *ever* applied for a winery license (McKeon Aff. ¶43), the very license which the Second Circuit assumed would promptly issue and solve the petitioners' problems as long as they just had a "physical presence" in New York? (Joint Appendix in Case #03-1274 at 159-60) (hereinafter "J.A.")

Amicus therefore submits this Brief to give this Court some idea of the actual hurdles interposed between citizens of the forty-nine other States of the Union who wish to sell wine to citizens of the State of New York who wish to buy that wine. *Amicus* urges this Court to reject the notion the real-world magnitude of discrimination between citizens of different States does not matter to the law and is not worthy of examination. We respectfully submit that it is untenable to hold, as the opinion below in effect did, that any burden on interstate commerce, no matter how heavy its practical effect in discriminating between citizens of different States who seek to engage in it, is sanctioned merely by reference to the 21st Amendment and a generalized "desire" of a State to "regulate" the wine industry, so long as there is a theoretical basis to conclude that out-of-state wineries may in some manner compete, *however unequally*, with local businesses. Such an argument, if accepted, would eviscerate the central principle of the Union created by our Constitution supplanting the Articles of Confederation.

Such a purpose was surely not intended even by the drafters of the 21st Amendment, let alone by the Founding Fathers. For:

> Unquestionably one of the great advantages anticipated from the grant to Congress of power over commerce was that state interference with trade, which had become a source of sharp discontent under the Articles of Confederation, would thereby be brought to an end. As [Daniel] Webster stated in his argument for appellant in *Gibbons v. Ogden*: "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States,

> and to place it under the protection of a uniform law."

The Constitution of the United States of America: Annotated, Analysis and Interpretation, Senate Document No. 99-16 at 200 (2002 ed.).

We respectfully submit that the Constitution was never meant to be blind to the facts of life, and our Courts are not required, in construing it, to blind themselves to commercial and other realities that the citizens who live under the Constitution necessarily must live with. "We the People of the United States, in Order to form a more perfect Union" are the very first words of the Constitution, after all, followed soon after by the aims to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The point was to enable freedom and enhance the citizens' lives, promote the general welfare of the entire nation and not just favored grantees of State-conferred monopolies, and not to enhance the powers of particular State governments or State regulators.

Nor is it irrelevant that the expansive interpretation of the scope of the national concern with interstate commerce has loomed large in the history of Congressional legislation and the decisions of this Court. Especially in an "Internet Age" of almost instantaneous worldwide commerce, in which the cliché that the "world is shrinking" is repeated more and more often, it must be recognized that the avenues of interstate commerce are wider today, offering more possibilities for the free trade of citizens, than the Founders could have dreamed.

Ironically, the Second Circuit candidly recognized some of these very facts:

> The winery plaintiffs presented *compelling proof* that boutique wineries with limited production of high quality wine have a niche in an increasingly sophisticated *national market* of wine connoisseurs. Facility of travel and the Internet have made wineries all over the nation available to those wishing to visit and buy wine – personally or in a virtual sense. Indeed, a majority in both houses of New York's legislature felt that New York wineries (the vast majority of which are quite small) would benefit from a reciprocity statute that would allow direct sales to consumers by unlicensed out-of-state wineries from states allowing New York wineries the same opportunity. See S. 3533-A, A-7411, 1995 Senate-Assembly Bill (NY 1995). The governor chose to veto the bill. *See* Governor's Veto #76 (NY 1995). Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment.[5]

Regrettably the Court felt that facts such as these somehow had to be excluded from its analysis. *Amicus* hopes this Court will disagree, and find instead that these facts make it especially anomalous to artificially constrain petitioners' legal and Constitutional rights with walls of economic provincialism and local protectionism.[6]

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[5] *Id.* at 239 (emphasis supplied). Hereinafter, unless otherwise indicated, all emphasis shown will be supplied.

[6] One local federal court found that the legislature had closed off competitive avenues "to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages. . . ." *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970).

In this spirit, we offer a review of New York's regulatory regimen and its actual impact. And we must begin with the reminder that if New York's scheme is allowed to stand as a barrier to commerce, there are forty-nine other States which could enact such barriers. Any winery that wished to exercise what it believes to be its right to sell its product in any State on the same terms as that State's own citizen-wineries do, necessarily would face the potential restrictions of fifty States. Thus the types of obstacles we describe here have to be projected nearly fifty-fold before they can be fairly weighed against the 21st Amendment's concerns. And if the following recitation of the statutory and regulatory hurdles is somewhat mind-numbing, we beg the Court's indulgence but submit respectfully that it fairly reflects the harsh realities of the discrimination waiting to be inflicted upon out of state wineries trying also to thread their way through this daunting legal and regulatory maze to see if they can get a limited license and conduct commerce.

I. NEW YORK ABC LAW DISCRIMINATORILY OBSTRUCTS NON-NEW YORK WINERIES

A. An Overall Shipment Ban Weighs Upon Non-New York Wineries

Unlike the exception provisions which New York State claims might allow non-New York wineries to sell wine to New York consumers, the overall, baseline ban is crystal clear. Alcoholic Beverage Control (hereinafter "ABC") Law §102(1)(c) provides in pertinent part that:

> *No* alcoholic beverages shall be *shipped into* the state unless the same shall be *consigned to a person duly licensed* hereunder to traffic in alcoholic beverages. This prohibition shall apply to all

> shipments of alcoholic beverages into New York state and includes importation or distribution for commercial purposes, for personal use, or otherwise, and irrespective of whether such alcoholic beverages were purchased within or without the state . . . .

Id. If this were not enough, not only must any consignee be licensed in New York but ABC Law §102(1)(d) further reinforces this ban by declaring that "*No common carrier or other person* shall bring *or carry into* the state any alcoholic beverages, unless the same shall be *consigned to a person duly licensed* hereunder to traffic in alcoholic beverages. . . .," *id.* In sum, New York's borders are hermetically sealed against any commercial[7] interstate importation of wine, unless it is consigned to a licensee.

In sharp contrast, New York law permits New York wineries to truly direct-ship from their doors to New York consumers. In brief, "commercial" and "farm" wineries may obtain a retailer's license and either ship straight to consumers via common carrier (for "farm" wineries) or via their own trucks ("commercial" wineries) and even to ship other New York wineries, and may also ship "New York state labeled wine" directly to consumers. *See generally* ABC Law §§76, 76-a.

B. That Consignment Requirement Discriminatorily Bans Direct Shipment

The existence of the above consignment requirement imposed upon out-of-state wineries is crucial to this appeal

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[7] There is a limited exception for an individual personally bringing in a small quantity of wine from abroad.

because the *central premise* of the opinion below appears to be mistaken in a material respect. The court below flatly declared: "More importantly, however, a licensed winery may also obtain a retail license, allowing it to sell and ship its wines *directly* to consumers. *Id.* §§76(4), 77(2)." *Id.* at 229. But that is not quite so, as even the State's affiant, State Liquor Authority General Counsel McKeon conceded: "In the instant litigation, the plaintiffs seek to engage in a business – the direct shipment of wine from out-of-state wineries to New York consumers – which *is not allowed* under the ABC Law." McKeon Aff. ¶43, J.A. 159-60. (*See also* 2d Cir. Jt. Appx. 306-346, letters from New York indicating that direct shipment from out-of-state prohibited). At best, out-of-state wineries always have to *double-ship*, and can never rightfully direct ship under New York law.

In fact, the one court construing the question recognized that before 1970 there were some opportunities for out-of-state wineries to ship directly to New York consumers, but not since then. The court found that the legislature had closed off those avenues "to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages. . . ." *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970). Not only is it clear that direct shipping is literally banned, but the ban was effected for protectionist reasons that should *not* be sanctioned under the Commerce clause.

For non-New York state wineries, direct shipment and home delivery to a New York consumer by mail or common carrier, in a manner in which other goods are sold and delivered in mail or internet selling are barred by these provisions. They cannot do what every New York winery

can do. And it matters not whether the out-of state winery desiring to ship is fully licensed and inspected in its own State, whose health and safety regime may be more rigorous than New York's own, nor whether the shipments flow directly from a winery, warehouse or storeroom bonded by the United States government itself.

What the Court below concluded was that the statutory scheme did not allow for even any arguable opening permitting out-of-State wineries to sell their wines in New York, unless the out-of state wineries established a "physical presence" in New York, *Swedenburg supra* at 229, and became licensed in New York. The consignment requirement quoted above guarantees that a physical presence would be indispensable. That presence requirement is a product *inter alia* of ABC Law §3(37)'s definition of "winery": a winery is "any place or premises wherein wines are manufactured from any fruit ... and also *includes a winery for the manufacture of wine in any state other than New York state and which has and maintains a branch factory, office, or storeroom within the state of New York and receives wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state.*" *Id.* The State's affiant, McKeon, makes this same point, McKeon Aff. Note 2 at 15-16 (J.A. 159). But this physical presence and warehousing and consignment stricture does even more: it *bars direct delivery*, which in common knowledge is the method commonest by far in interstate consumer buying.

In this manner, the consignment requirement *ipso facto* discriminates against out-of-state wineries because New York wineries *by nature* have a physical presence in New York, and thus they do not need an intermediate "consignee" because they may deliver directly to New York

consumers wholly unaffected by the rigors of ABC Law §102(1)(c) and (d). If this is permissible despite the requirements of our Nation's Commerce Clause, every one of the forty-nine other states in which a winery is not a "native" citizen may bar it from direct delivery of its product.

It does not take much imagination nor volumes of elaborate proof to see the inevitable consequences of this restriction. The cost alone of maintaining one or more[8] separate consignment facilities in forty-nine other states is sure to practically prohibit smaller, "Mom and Pop" wineries from ever venturing into national commerce. And it should not be forgotten that this cost cannot simply be one of renting a bit of warehouse space, for the warehouse must be bonded and permitted (ABC Law §96), the warehouse or place of sale cannot be any available space but only one located in certain spots (*e.g.*, have a street level entrance, not located within 200 feet of a church or school, ABC Law §105(2) and (3)), records must be kept locally for inspection and full-time local staff hired and available to certify the inventory and records (McKeon Aff. ¶22, J.A. 151), and arrange the shipments or deliveries and so forth. Indeed, in order to obtain a license in New York, all wineries must *first* identify the specific premises in which the business will be operated (the "licensed premises")[9]; and

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[8] If, as the Second Circuit apparently concluded, the practical economic burdens cannot even be examined in the Constitutional analysis, what prevents a State from demanding, for example, to make inspections easier for officials or for some supposed health or other "police power" purpose, that out-of-State licensees have a consignment facility in each county?

[9] *See* ABC Law §110(1)(b) & (f); McKeon Aff. ¶20 (J.A. 151); ABC Law §105(1) ("No retail license to sell liquors and/or wines for consumption off the premises shall be granted for any premises, unless the applicant shall be the owner thereof, or shall be in possession of said

(Continued on following page)

while this requirement also applies to New York wineries, it is almost obviously not much of a burden given that they are already in New York and can use the property on which they already operate their licensed winery. In addition, the costs of simply having to maintain inventory at forty-nine or more separate locations should not be underestimated.

Even if a winery could sustain these costs, it is almost certain that they would have to be reflected in higher prices for out-of-State sales. Business costs must be paid, and the sales price is ultimately what pays them. All of these local costs, times up to forty-nine counting each State, plus the inevitable increased cost of always having to ship *twice*, once to the consignee locally and again to a consumer, obviously would put out-of-State wineries at a further competitive disadvantage to local (in this case, New York) wineries.

Finally, in contrast to these burdens, native New York wineries have available the benefit of a host of special statutory provisions, mentioned briefly above, allowing direct shipment of their wines straight to New York consumers.[10]

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premises under a lease, in writing, for a term not less than the licensed period. . . .").

[10] *See also*, ABC Law §76(4) (licenses to sell "New York state labeled" wines directly); §76(2)(a) (direct sales of "New York state labeled" wines at wine tastings); §77(5) (allowing Sunday sales by New York wineries of "New York state labeled" wines); §77(4)(b)(4) (New York wineries allowed to sell "New York state labeled" wines of other wineries); and §76(5) (New York wineries may make wine deliveries for other New York wineries).

If the score of burdens innocuously dubbed a mere "physical presence" requirement, the direct shipment ban and double-shipping requirement and all of their ramifications were not discrimination enough, there is more.

C. Added to a Burdensome "Physical Presence" Requirement Are Delivery Strictures

In addition to "physical presence" and all of its burdensome manifestations discussed above, non-New York commercial winery licensees are also subject to significant restrictions on how they must *deliver* the wine they sell, above and beyond what is demanded of New York wineries.

Under ABC Law §77(2), in order to deliver their own wine, a non-New York winery would have to obtain a retailer's certificate, because retailer licenses under §76(4) authorize a winery only to deliver "New York state labeled wines." Further, ABC law §105(8) and (9) allow retail licensees to deliver to homes of purchasers only "in vehicles owned and operated by such licensee, or hired and operated by such licensee from a trucking or transportation company registered with the liquor authority." On top of that, ABC Law §116 pertinently provides: "No alcoholic beverage shall be transported within this state by any vehicle unless such vehicle is owned and operated, or hired and operated by a licensee . . . provided, however, (a) that alcoholic beverages may be transported by a retail licensee to the home of a purchaser not to be resold by the purchaser. . . ."

Hence, non-New York wineries would be able to deliver their wines only in trucks either owned by them or hired from a trucking company licensed by the liquor

authority. *See also* McKeon Aff. ¶43 (J.A. 159-60). While this also applies to native commercial wineries in New York, they presumptively already have vehicles there, whereas the non-New York winery would have to have additional vehicles located in New York devoted solely to New York direct shipping, or they would have to hire a licensed common carrier to deliver for them. Assuming *arguendo* that this does not practically prohibit the interstate commerce the non-New York wineries seek to engage in, then perhaps the largest effect of the alleged "physical presence" requirement is to force out-of-State wineries to deliver their wines to a New York warehouse intermediate resting place first, and then drive them to the customer's home in New York-licensed trucks; surprisingly, however, this result is no different from the very three-tier distribution system which New York wineries are allowed by the law to avoid.

Is that not discrimination enough, together with all of the preceding examples synergistically spinning an impenetrable web of barriers to national commerce? Nevertheless, the New York statutory scheme has yet more obstacles and burdens to offer "foreign" wineries from other States.

D. An Extraordinary Additional Barrier Is Posed by the Ban on Credit Card Sales

We earlier referred to the commonplace method of national sales of direct shipment of a product after an interstate sales transaction conducted via mail, or telephone or "internet." There is yet another commonplace, of which this Court may take judicial notice: the prevalence of credit card sales in such interstate commerce. Few

consumers send cash through the mail, and fewer send checks than in the past. And obviously, in "internet" commerce, sales are almost exclusively done by "instant payment" offering the unparalleled convenience of electronic ordering, *i.e.*, by credit card payment or an analog of same (*e.g.*, "Pay Pal" or other electronic intermediary). Yet New York law clearly bars out-of-State wineries from using credit card sales. ABC Law §100 only allows credit card sales of wine *at the winery itself*, which, for the reasons that follow, must be interpreted to mean at a winery that is located *in* New York state itself. ABC Law §100(5) provides in pertinent part that "a winery licensee having the right to sell wine at retail for off-premises consumption may accept third party credit cards *for the sale of said beverages at the winery premises only*," *id.*

The language expressly speaks of a "sale . . . at" the winery, not "by" the winery, and reinforces that specific limitation by specifying not just "at the winery" but at the "winery *premises*." Thus any semi-legal fiction that a warehouse in New York which produces no wine might be in *some senses* a "winery," may well not stretch to include "winery premises." Indeed, that doubt is magnified by the statutory definitions of "winery." First of all, ABC Law §3(37) defines a "winery" as "any place or premises *wherein wines are manufactured* from any fruit . . . and also includes a winery for the manufacture of wine in any state other than New York state and *which* has and maintains a branch factory, office, or storeroom within the state of New York and receives wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state." That definition includes non-New York wineries *which have* "offices" or "warehouses" in the state, thus again distinguishing

between the winery "premises" out of state and the "office" or "warehouse" in the state.

At the very least, this casts a serious legal doubt over the legality of credit card sales, a doubt and uncertainty which is in itself discriminatory compared to clear legalities of credit card sales practiced and permitted by New York wineries.

Finally, given the overwhelming dominance of credit card sales in modern interstate selling, it is highly ironic that the practical effect of New York's credit card restrictions, which are integrated into the rest of the regulatory regime for wine sales, end up – if not disallowing the interstate commerce at issue – meaning that a non-New York winery will legally effectuate all or virtually all of its sales to New York customers from its *non*-New York-licensed winery premises in another, "foreign" state.

Is that still not discrimination enough, together with all of the preceding examples? If not, incredibly, the New York statutory scheme has yet more obstacles and burdens to offer "foreign" wineries from other States.

New York's credit card sale restrictions are probably fatal, practically speaking to non-New York wineries wishing to sell their valued products to willing New York consumers, a lethal discrimination. Again we must respectfully ask: Is this all not overwhelming, unconstitutional discrimination against citizens of other states of our Nation?

But before leaving the subject of the barriers facing non-New York wineries, it is important to emphasize that the postulated substitute for simply *equal rights* with native New York wineries, tendered by the State and accepted without much real-world scrutiny by the court

below, is a maze of laws and regulations filled with thick clouds overshadowing any firm rights. As stated before, New York's affiant admits that no out-of-state winery ever applied for the license he postulates. McKeon Aff. ¶43 (J.A. 159-60).[11] We respectfully submit that in the face of this plea for Constitutional rights, hints of possibilities do not substitute for legal rights. The strong challenge here based on fundamental rights of citizens of a nation cannot be satisfied with a prediction that certain commerce might be theoretically possible.

Even assuming *arguendo* that the untested assumption of possible licensing has any validity, we respectfully submit that it is inherently and materially discriminatory (a) that all that non-New York wineries can get is an exception based upon very delimited circumstances and requisites, (b) that out-of-staters are forced to crawl through complex exceptions or loopholes in order to do commerce, and (c) that the supposed alternatives proffered are actually under a great legal cloud of uncertainty, with the out-of-staters having to gamble that they will be permitted at the end of what is often a long regulatory road.

II. IN CONTRAST, NEW YORK ABC LAW DISCRIMINATORILY FAVORS NEW YORK WINERIES

This discrimination stands out even more upon a brief mention of the special legislative provisions which positively *favor* New York wineries.

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[11] We also know of no cases, and none have been cited, in which the provisions that New York posits have actually been recognized in practice and allowed to any non-New York winery by New York regulators.

The Special "Farm Winery" and "New York state labeled" Wine Exceptions

The Second Circuit recognized one, but only one area of privilege:

> Smaller New York wineries can obtain a farm winery license at a lower fee. N.Y. Alco. Bev. Cont. Law §76-a (McKinney 2000). A licensed farm winery can manufacture no more than 150,000 finished gallons of wine annually, id. §76-a(7), and must use New York-grown grapes or other fruits in the manufacturing process. Id. §76-a(5). Like other licensed wineries, a licensed farm winery may sell and ship its wine to a licensed winery, wholesaler or retailer, or directly to consumers. Id. §§76-a(3), (6)(d).

Id. at 228 n.2. Thus both farm wineries, and producers of New York state labeled wines, are favored.

In stark contrast, however, non-New York wineries cannot become New York "farm wineries" and thus cannot utilize the sales and shipping methods of farm wineries. Even according to the State, they can only become normal "commercial" wineries in New York. *See* ABC Law §§3(21-a), 76-a(5) & (7); McKeon Aff. ¶43 (J.A. 159-60). And "New York state labeled" wine is quite a term of art: it is strictly confined to "wine made from grapes, at least seventy-five percent *[75%] the volume* of which were *grown in New York state*." ABC Law §3(20-a). The practical consequence of this definition is that few if any non-New York wineries, especially West Coast wineries, could get enough New York grapes to make such wine. Even if they could, the discriminatory impact would just be shifted upstream to non-New York grape growers rather than to wineries.

We submit that these and other pro-New York winery special provisions magnify the discrimination complained of in this case. And these special privileges extend far beyond the "farm winery" exemption focused on by the Court below. So, for example, ABC Law §76(4) allows New York wineries to sell "New York state labeled" wines directly to New York consumers, a privilege barred to out-of-state wineries. Similarly, ABC Law §76(2)(a) permits direct sales of "New York state labeled" wines by New York wineries at wine tastings at those wineries. And ABC Law §77(5) grants to New York wineries the privilege of making Sunday sales by New York wineries of "New York state labeled" wines. Likewise, ABC Law §77(4)(b)(4) grants New York wineries the right to sell "New York state labeled" wines of other wineries, a right not granted to non-New York wineries. Further, ABC Law §76(5) enables New York wineries to make wine deliveries for other New York wineries, as well. As the legislative history shows, these provisions were adopted expressly to benefit New York wineries in response to "low cost foreign competition" (2d Cir. Jt. Appx. 300, 296-299, 301-305). Again, all the above privileges are denied to non-New York wineries, discriminatorily.

CONCLUSION

We have perhaps dragged the Court through a maze of discriminatory statutory provisions and, hopefully, indicated the palpable real-world discrimination the statutes inflict. The Second Circuit believed that such practical scrutiny was impermissible in the analysis; we submit that, on the contrary, it is indispensable if, as Justice Holmes and a unanimous Court were right that "Commerce" is a

"practical [concept], drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905).

We not only submit respectfully that real-world scrutiny is a must, but that discrimination against out-of-state citizens always demands strict scrutiny. Historically, the Prohibition Repeal Amendment surely was never meant to supersede the bedrock of freedom of National Commerce born with the Constitution. The opposite premise would in effect sanction in a material respect turning this Union back into a Confederacy. And it was doubtless no accident that the Prohibition Repeal Amendment itself was born of the same party platform and in the same era as unprecedented national government power – especially under the Commerce Clause. Preserving these rights, and the great principle of free National Commerce requires vigilance and strict scrutiny from this Honorable Court; as the Court observed in giving birth to the doctrine of strict scrutiny, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938),[12] it flows in part from the need to protect minorities

[12] Many scholars trace the philosophical birth of the Constitutional strict scrutiny doctrine to Justice Stone's famed footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *Carolene Products* laid out three key factors making strict scrutiny necessary, one of which is "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." Strict scrutiny was deemed necessary when the usual political processes could not wholly be counted on to repeal undesirable legislation. While the statute attacked does not insulate itself from repeal, the same concern – statutes insulated from political pressure for repeal by those affected – applies to discriminations against out-of-state residents, who are citizens of other states who will seldom if ever have the in-staters' influence for repeal – and never have the vote which in-staters can cast for candidates favoring repeal. *Amicus* respectfully submits that this need to strictly scrutinize statutes which can be insulated from normal pressures for repeal is always present when discriminatory state statutes collide with the dormant Commerce

(Continued on following page)

who cannot themselves prevent discrimination by "voting the rascals out" as it were, the position non-New York wineries are necessarily trapped in. Such scrutiny cannot sustain the discrimination, statutory and practical, inflicted by New York in this case.

Amicus Millbrook is interested in selling, and directly shipping, its fine wines to out-of-state wine lovers, many of whom desire to purchase them through direct orders. Current law deprives both non-New York wineries and New York wine lovers – and potentially all American wine lovers – opportunities to easily enjoy wines from everywhere in the Country. And, if New York opened direct shipping to non-New York wineries, then, through reciprocity provisions in other states, Millbrook and other wineries would be able to direct ship to such other states, further freeing national commerce in this area from discrimination. So, for all of the above reasons, *Amicus Curiae* Millbrook respectfully urges this Honorable Court to vacate the judgment of the court below and grant the relief sought herein by Petitioners.

Respectfully submitted,

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July 29, 2004

Clause, and thus this concern and its remedy of strict scrutiny trumps other sources of state power, even the 21st Amendment. Of course, in addition, weighty Constitutional considerations such as Plaintiff's rights under the Privileges and Immunities Clause and the Fourteenth Amendment also counterbalance 21st Amendment concerns herein.

(13) (11) (10)

Nos. 03-1116, 03-1120, 03-1274

Supreme Court, U.S.
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JUL 26 2004
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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association, Inc. (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* in

support of the position of the Petitioners and respectfully urge this Court to overturn the judgment of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).[1] This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

INTEREST OF THE *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the 19 jurisdictions[2] that directly control the distribution and sale of alcohol beverages through the operation of state-owned wholesale and, in some cases, retail outlets; these jurisdictions also regulate the sale of alcohol beverages by private outlets such as package stores, restaurants and taverns. NCSLA is an unincorporated membership association whose members are the remaining jurisdictions that simply regulate private sellers of alcohol beverages. Some jurisdictions are members of both organizations. Taken together, NABCA and NCSLA represent the state, and, in some cases, local government agencies charged with regulating the distribution and sale of alcohol

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[1] Counsel of record for the *amici curiae* was the sole author of this brief. No person or organization other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

[2] NABCA's members include the Alabama Alcoholic Beverage Control Board, Idaho State Liquor Dispensary, Iowa Alcoholic Beverages Division, Maine State Liquor & Lottery Commission, Michigan Liquor Control Commission, Mississippi State Tax Commission, Montana Department of Revenue Liquor Division, Montgomery County (MD) Department of Liquor Control, New Hampshire State Liquor Commission, North Carolina Alcoholic Beverage Control Commission, North Carolina Association of ABC Boards, Ohio Division of Liquor Control, Oregon Liquor Control Commission, Pennsylvania Liquor Control Board, Utah Department of Alcoholic Beverage Control, Vermont Department of Liquor Control, Virginia Alcoholic Beverage Control Board, Washington State Liquor Control Board, West Virginia Alcoholic Beverage Control Administration and Wyoming Department of Revenue Liquor Division.

beverages in all 50 states. Several of these agencies are or have been defendants in litigation similar to the instant case and all would have their ability to regulate alcohol beverages significantly impacted by the decision in this matter.

SUMMARY OF ARGUMENT

The plain language as well as the judicial interpretation of the Twenty-First Amendment clearly supports the validity of the state laws that are under attack herein. Further, a state's regulation of the interstate shipment of alcohol beverages directly to its consumers is an inherent part of a state's structure of its alcohol beverage industry, a function that clearly falls within the so-called "core" powers of the Twenty-First Amendment and that also acts to immunize a state's action from Commerce Clause scrutiny.

Alternatively, even if one accepts the premise that a state's regulation is precluded by the Commerce Clause, one must consider the impact of the Webb-Kenyon Act, a federal statute that both pre-dates and post-dates the adoption of the Twenty-First Amendment and that serves to strip alcohol beverages of their normal interstate commerce protection, thus allowing a state to impose the kind of regulation on the importation of alcohol beverages that is at issue here.

ARGUMENT

I. MICHIGAN'S APPROACH TO REGULATION IS PERMISSABLE UNDER THE PLAIN LANGUAGE AND JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

Drink is in itself a creature of God, and to be received with thankfulness.

Increase Mather, 1673

The thing has arrived to such a height, that we are actually threatened with becoming a nation of drunkards.

Greene and Delaware Moral Society, 1815

The production, sale and regulation of alcohol beverages have long been a source of controversy as well a fertile area for litigation within the United States. In the early days of the nation, the new federal government sparked an agrarian uprising—known as the "Whiskey Rebellion"—when it sought to impose, for the first time, a federal excise tax on distilled spirits, in part to fund the debt of the Revolutionary War.

While the federal government thus staked a "claim" to its right to tax alcohol beverages, it generally did not seek to impose other restrictions on its production and distribution. That responsibility fell to the individual states, which sought to exercise control over the product's distribution by licensing sellers, an action that was upheld by this Court in *The License Cases*, 46 U.S. 5 How. 504 (1847). It should be noted that, even today, the federal government's regulation of alcohol beverages outside of the tax area is limited to scrutiny of certain trade practices. The "imposition" of a national minimum drinking age was not done directly, but rather as an exercise of Congress' spending power. In fact, this Court questioned whether Congress even possessed the power to directly impose a national minimum drinking age. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987).

A strong anti-alcohol movement emerged in the latter half of the nineteenth century. Several states attempted to legislate a totally "dry" environment in which the sale of alcohol was prohibited, the National Prohibition Party was formed in an effort to impact federal elections, and such groups as the Women's Christian Temperance Union and the Anti-Saloon League were born out of a concern about the adverse effect that excessive consumption of alcohol beverages was having on the country's moral fabric.

Some states opted for virtually unrestricted commerce in alcohol beverages while others opted to be "dry," that is, they prohibited virtually all traffic in alcohol beverages. Still others adopted "local option" statutes, giving cities, towns and municipalities the authority to determine whether to allow the sale and distribution of alcohol beverages.

Although Congress generally adopted a "hands-off" policy with regard to alcohol beverage regulation, except for federal taxation of the product, state regulation of trade in alcohol beverages soon ran afoul of the Constitution's grant to Congress—and Congress alone—of the authority to regulate commerce among the states. U.S.Const. Art. I., Sec. 8, cl. 3. Expressly overruling a 50-year-old precedent, this Court declared invalid an Iowa law regulating the sale of alcohol beverages which had been shipped from outside the state. *Leisy v. Hardin*, 135 U.S. 100 (1890).

Reacting to *Leisy*, Congress passed the so-called "Original Packages Act," also known as the Wilson Act, which declared that, upon arrival into a state, alcohol beverages became subject to the regulatory scheme of the state, in the same manner as alcohol beverages produced within the state. Act of August 8, 1890, c. 728, 26 Stat. 313 (current version at 27 U.S.C. §121).

Passage of the Wilson Act, however, did not totally clarify the ability of states to regulate trade in alcohol beverages within their borders. Although the constitutionality of the Wilson Act was upheld, *In re Rahrer*, 140 U.S. 545 (1891), in *Rhodes v. Iowa*, 170 U.S. 412 (1898), this Court held that, although alcohol beverage products lose their character as items of interstate commerce *after* their delivery into a state, the Wilson Act did not authorize the laws of a state to be applied to such merchandise while in transit and prior to delivery to a consignee within the state.

Similarly, in *Vance v. W.A. Vandercook Company*, 170 U.S. 438 (1898), this Court declared that the Wilson Act did not recognize the right of a state to prevent an individual from ordering alcohol beverages from outside the state for his own consumption.

Congress moved to close this "loophole," but not until 1913 did it succeed in passing, over the veto of President William Howard Taft, what is now commonly referred to as the Webb-Kenyon Act. Act of Mar. 1, 1913, c. 90, 37 Stat. 699 (current version at §27 U.S.C. 122). The title of the Act—"An Act divesting intoxicating liquors of their interstate character in certain cases"—is instructive in determining the motivation for its adoption. Rep. Clayton, Chairman of the House Judiciary Committee, which extensively debated the bill prior to its consideration by the full House of Representatives, clearly explained its purpose when he declared

> The purpose (of the bill) is to take the protecting arm of the Federal Government, by virtue of the interstate commerce clause of the Constitution, from around the illicit dealers in liquors, and is to allow the States which have passed police regulations restricting or forbidding the sale of liquor to better enforce those regulations.

49 Cong. Rec. H2864 (daily ed. February 8, 1913).

This Court upheld the validity of the Act, holding that there was no reason to state that because Congress had a power to forbid movement of a product in interstate commerce, it did not also have the authority to establish a regulation making it impossible for one state to violate the prohibition of the law of another state in interstate commerce. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917). That analysis is still good law today.

This Commerce Clause exception was quickly swallowed up by the national experiment known as Prohibition when the Eighteenth Amendment was declared to have been ratified by

the requisite number of states on January 29. 1919. Section 1 of the Eighteenth Amendment not only banned the manufacture, sale or transportation of alcohol beverages within a state, but it also prohibited the importation into any state of alcohol beverages originating in another state.

When it became apparent that Prohibition was a failure, Congress moved to undo its Constitutional underpinning by adopting the Twenty-First Amendment; ratification was completed on December 5, 1933. Congress could have completed its effort merely by adoption of Section 1 alone. That would have repealed the ban on activity within a state, as well as the prohibition on importation of alcohol beverages into any state. However, Congress chose to add Section 2, which plainly declares

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

To underscore the Congressional statement on the impact of the Amendment, the Webb-Kenyon Act was subsequently re-enacted without change 1935. Act of Aug. 27, 1935, c. 740 §202(b), 49 Stat. 877 (current version at 27 U.S.C. §122).

These two affirmative statements of Congressional intent make it crystal clear that Congress meant to create an exception to the normal rules of interstate commerce regulation in the case of alcohol beverages. As the Constitution's sole regulator of interstate commerce, Congress clearly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Using its authority, Congress could have restricted a state's authority to ban or regulate imports only in situations where the state treated in-state products in the same manner, but it did not. Nowhere in the plain language of the Twenty-First Amendment is there a hint that, for the purpose of regulating

transportation or importation into any state, a state must treat out-of-state alcohol beverages in the same manner in which it treats in-state alcohol beverages.

This Court promptly recognized the impact of the Twenty-First Amendment, noting that it "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). This Court has continued to recognize that the Twenty-First Amendment "primarily created an exception to the normal operation of the Commerce Clause," *Craig v. Boren*, 429 U.S. 190, 206 (1976), and that the resultant authority of the state under the Amendment over importation of alcohol beverages "is transparently clear." *Id.* at 207.

Even as this Court later appeared to suggest that the grant of authority under the Twenty-First Amendment must be balanced with Congress' power under the Commerce Clause under certain conditions, the scope of those conditions has been made abundantly clear:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.

California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 110 (1980)

In its most recent review of the Twenty-First Amendment, this Court noted that Section 2 delegated to the states the power "to prohibit commerce in" alcohol beverages and further stated that state "regulatory power over this segment of commerce is therefore largely 'unfettered by the Com-

merce Clause.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996), citing *Ziffrin*, supra.

This Court has thus clearly demarcated the scope of the Twenty-First Amendment: states have "virtually complete control" over the importation of alcohol beverages. As to "other regulations," however, the state's authority must be balanced against the Commerce Clause.

In holding the Michigan statute invalid because of a conflict with the Commerce Clause, the court below misapplied this long-standing and clear interpretation of the Twenty-First Amendment. The lower court contended that the "proper approach" in this case was to apply traditional dormant Commerce Clause analysis and, if the state's approach to regulation was found to be unconstitutional, to determine whether the unconstitutionality was somehow "saved" by a Twenty-First Amendment analysis.

The *amici cuirae* believe that this approach is erroneous; the lower court should have first looked at the plain language of the Twenty-First Amendment to determine its applicability to the situation at hand before going on to review other sections of the Constitution, not the other way around.

Further, the court below also erroneously relied on *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) to support its reasoning. That case involved a state's regulation of alcohol beverages—in this case, taxation—once the beverages had arrived into the state. The state did not seek to justify the tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Amendment; in fact, the state acknowledged that the purpose of the discriminatory taxation scheme was to promote a local industry *Id.* at 276. Indeed, the Twenty-First Amendment claim in that case was not even raised by the state until Supreme Court consideration.

Thus, based on the plain language and judicial interpretation of the Twenty-First Amendment, the opinion of the court below should be reversed and the validity of Michigan's statute upheld. By the same reasoning, New York and other states should be permitted to regulate imports of alcohol beverages in the manner they see fit, even if that regulation involves differential treatment of in-state products.

II. MICHIGAN'S STATUTE CLEARLY FALLS WITHIN THE "CORE POWERS" OF THE TWENTY-FIRST AMENDMENT THAT HAVE BEEN RESERVED TO THE STATES

Even if one takes the position that a balancing of the Twenty-First Amendment and the Commerce Clause should be considered, it is readily apparent that the court below erred in its construction of a state's "core powers" under the Amendment that are to be given precedence over the Commerce Clause.

In its brief discussion of "core powers," the court below erroneously dismissed virtually out of hand the notion that Michigan's direct shipment ban promotes "temperance, ensuring orderly market conditions, and raising revenue" which are the state's "core powers" under the Twenty-First Amendment that this Court has long recognized. *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

Other courts have also shed light on a state's "core powers." For instance, mere regulation of the sale of alcohol beverages is not sufficient to overcome a Commerce Clause challenge; a state's regulation "must effect the structure of the state liquor distribution system." *Pete's Brewing Co. et al. v. Whitehead*, 19 F.Supp.2d 1004, 1020 (W.D.Mo. 1998).

There can be no question that Michigan's decision to prohibit the direct shipment of alcohol beverages from a location outside of the state to consumers within the state is

an integral part of the structure of the liquor distribution system that the state has chosen to implement. The sale of alcohol beverages does not take place in a free and unregulated market. Buyers of alcohol beverages must be twenty-one years of age or older. Sellers are limited to those who have been licensed by the state after an exhaustive check of their background. Many licensed sellers, especially those at the production or wholesale level, are frequently required to remit excise taxes to the state and licensed retailers are required to collect and remit applicable sales taxes when the product is transferred to the ultimate consumer. Many jurisdictions (e.g., cities and counties) have opted to be totally "dry," prohibiting the sale of alcohol beverages altogether.

To strike down a state's statute as an impermissible burden on interstate commerce outside of the state's "core powers" under the Twenty-First Amendment would undermine a state's ability to structure any kind of distribution system, and lead to a totally unregulated market in alcohol beverages. *Every* regulation of in-state producers and sellers would have to be applied equally, and could lead to virtually unrestricted trade in alcohol beverages, not only to consumers, but to in-state retailers as well. If out-of-state sellers are permitted to ship into a state directly to the state's consumers, the state will lack the ability to effectively enforce its laws governing age of purchaser, background of sellers and collection of revenue, all of which are central to the system of distributing and selling alcohol beverages.

Michigan has not rendered it impossible for out-of-state vendors to reach its consumers. It has merely structured a system—and done so within the parameters permitted under the Twenty-First Amendment—that requires licensing and tax collection. Out-of-state vendors who wish to reach Michigan consumers may do so within the regime laid out by the state.

While some may believe that there is a less intrusive way for a state to regulate the importation of alcohol beverages

into its borders, the Twenty-First Amendment clearly gives the state legislature, and not the courts, the power to determine what kind, if any, importation to allow, and under what circumstances. This Court should not now undermine the plain meaning of the Twenty-First Amendment and its own long-standing interpretations of that Constitutional provision by the judicial insertion of conditions that have not heretofore been recognized.

III. EVEN IF ONE ASSUMES THAT THE COMMERCE CLAUSE "TRUMPS" THE POWER ACCORDED TO THE STATE UNDER THE TWENTY-FIRST AMENDMENT, CONGRESS HAS UTILIZED ITS COMMERCE CLAUSE AUTHORITY TO DELEGATE CONTROL TO THE STATES

There is yet another reason, however, why Michigan's regulatory approach must be permitted to stand. Even if one accepts the reasoning of the court below, which the *amici curiae* believe is erroneous, one is left with Congress' utilization of its interstate commerce power in the Webb-Kenyon Act.

As has been indicated previously, that Act both pre-dates and post-dates adoption of the Twenty-First Amendment. Its purpose was unmistakably clear: "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *Clark Distilling Co.*, supra.

Placed in the context of the earlier Wilson Act, the Webb-Kenyon Act represents a "further surrender to the states of the constitutional power of Congress to regulate interstate commerce in intoxicating liquors." *Dugan v. Bridges*, 161 F.Supp. 694, 704 (D.N.H.), appeal dismissed 300 U.S. 684 (1936). The Act shows an intent to give the states an "entirely free hand" in regulating the importation of alcohol beverages,

Id., and there appears to be no prohibition against discrimination between liquors produced within the state and those produced outside the state. Put another way, the Act sanctions differential treatment of sellers, depending on their location.

The re-enactment of the Webb-Kenyon Act in 1935, subsequent to the adoption and implementation of the Twenty-First Amendment, underscores the principle that the Amendment does not withdraw from the states the power surrendered to them by the passage of the Act, regardless of whether one views the Act as a power abdicated that previously had been exercised by Congress, or as one having always been retained or reserved under the police powers of a state. *Id.* at 707.

The chronological timing of Congress' action in re-enacting the Act subsequent to the Twenty-First Amendment and its clear language indicate that, notwithstanding any other Commerce Clause analysis, Congress *did* intend to allow the states a free hand to regulate, or even prohibit, the interstate shipment of alcohol beverages into their borders.

To hold otherwise would render the Act and more than a century of Congressional pronouncements on the power of states a nullity.

While a balancing test against the Commerce Clause may be appropriate in certain instances of state enactments arguably supported by the power bestowed under the Twenty-First Amendment—a balancing test that, as stated, the *amici* do not believe is appropriate here—there can be no balancing test in construing what, in effect, is the grant of authority to the states under the Webb-Kenyon Act. Congress clearly determined to cede a portion of the federal government's interstate commerce authority to the states, and whether one agrees with the manner in which the state has exercised its authority or not, the clear result must be a deferral to

state action in the area of regulating importation of alcohol beverages.

There is nothing more basic to the structure of a state's alcohol beverage distribution system than the ability to determine under what conditions the product may be brought into the state. Alcohol beverages are one of a handful of products (tobacco and firearms being two others) that the government has determined warrant special treatment by means of controlling who may sell and who may purchase the product. There is not now, nor has there been for more than 150 years a "free" market in alcohol beverage distribution and sale. To disallow Michigan's (and other states') lawful attempt to control and regulate the distribution of this product would mean that virtually no importation regulation would be allowed to stand, leading to the uncontrolled and uncontrollable distribution of alcohol beverages.

This case is not about whether direct shipping of alcohol beverages to consumers should be allowed or prohibited. It is about the right of each state, acting pursuant to the Twenty-First Amendment, to decide for itself how it wishes to deal with its alcohol beverage distribution system.

Alcohol beverages should not be turned into the functional equivalent of polo shirts or blue jeans merely because a trier of fact believes there is a better way to regulate the product's flow.

CONCLUSION

For the reasons set forth herein, the decision of the Sixth Circuit should be overturned and the case remanded for further proceedings not inconsistent with the decision herein. The decision of the Second Circuit in a companion case should be upheld.

Respectfully submitted,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE VIRGINIA WINERIES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Virginia Wineries Association is a professional trade organization that represents the interests of Virginia wineries and promotes the growth and economic sustainability of the Virginia wine industry. The Association currently represents as active members 72 of Virginia's 87 licensed wineries. Its membership comprises sole proprietorships, partnerships, and corporations. In representing its members' interests, the Association opposes protectionist State laws, such as New York's licensing scheme, that prohibit its members from competing on an equal footing with wineries in other States. It supports equal treatment under State laws of all wineries in interstate commerce – in Virginia and throughout the nation. Accordingly, it has a direct stake in the outcome of the instant case.

SUMMARY OF ARGUMENT

The United States Constitution guarantees citizens the right to engage in interstate commerce free of discriminatory restraints imposed by protectionist State regulatory regimes favoring their own residents. While this Court has granted review under the Commerce Clause, New York's protectionist scheme is fully exposed

[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and their counsel made monetary contribution to the preparation or submission of this brief. As Petitioner Swedenburg is a member of the Association, *Amicus* did not use membership dues to finance this brief; rather, *Amicus* solicited individual contributions from members uninvolved in the litigation. Pursuant to Rule 37.3, *Amicus* states that Petitioners and Respondents have granted consent to file this brief.

as unquestionably unconstitutional only by analyzing it under the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause of Article IV, § 2. *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978). The Founders' writings, this Court's jurisprudence, and constitutional scholarship confirm that these two central constitutional provisions share a common history, function, and even the same textual source in the Articles of Confederation – evincing that the Commerce Clause and Privileges and Immunities Clause mutually reinforce the Constitution's mandate to secure comity and nondiscrimination in interstate commerce. *Id.*

In conjunction with the Commerce Clause's "negative" implication, this Court has repeatedly affirmed the right to practice one's commercial calling in interstate commerce as "one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause." *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 219 (1982) (Rehnquist, J.). New York's direct-to-consumer licensing scheme violates this right by exempting in-state wineries from regulation while denying this same economic benefit to out-of-state wineries. Although New York asserts constitutional immunity for this interstate discrimination under the Twenty-First Amendment, this Amendment did not effect a monumental constitutional revolution by annulling the ubiquitous constitutional norm of interstate commercial comity.

New York's protectionist licensing scheme exemplifies the "economic Balkanization" proscribed by this Court in *Bacchus Imports, Inc. v. Dias*, 468 U.S. 263, 276 (1984), and constitutes interstate discrimination that offends the "substantial equality" between the citizens of the several States. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Thus,

this Court should reverse the Second Circuit and hold New York's direct-to-consumer licensing scheme for in-state wineries unconstitutional under the Commerce Clause and, alternatively, under the Privileges and Immunities Clause.[2]

ARGUMENT

I. The Commerce Clause and the Privileges and Immunities Clause Have a "Mutually Reinforcing Relationship" in Prohibiting Discrimination Between the States.

The United States Constitution guarantees citizens the right to engage in interstate commerce free of discriminatory and protectionist State regulatory regimes favoring their own residents.

New York's discriminatory licensing regime exempts in-state wineries from its three-tiered system regulating alcoholic beverages by permitting them to ship wine directly to New York consumers. These direct-shipment licenses are denied to out-of-state wineries, unless they establish a physical presence in the State and thereby become *de facto* New York residents. *See Swedenburg v. Kelly*, 358 F.3d 223, 237-38 (2d Cir. 2004) (describing the discriminatory nature and effect of New York's licensing regime). A State statute that extends a regulatory exemption and economic benefit solely on the basis of the recipient's *in-state residency* is an invalid "law that overtly

[2] Although *Amicus* is filing its brief in this Court's review of *Swedenburg v. Kelly*, No. 03-1274, its analysis applies equally to this Court's review of *Granholm v. Heald*, No. 03-1116.

blocks the flow of interstate commerce at a State's border." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). This Court has repeatedly held such statutes to be "simple economic protectionism" proscribed by "a virtually *per se* rule of invalidity." *Id. See also New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988) (applying long-standing constitutional rule that "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" are prohibited under the "'negative' aspect of the Commerce Clause").

While this Court has granted review on the Commerce Clause issue, a complete analysis of that question requires an understanding of the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause of Article IV, § 2.[3] *Hicklin v.*

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[3] *Amicus* recognizes that corporations are not entitled to the protections of fundamental rights secured to citizens of the several States under the Privileges and Immunities Clause. *Paul v. Virginia*, 75 U.S. 168, 177 (1868) (noting that the "term citizens . . . applies only to natural persons, . . . not to artificial persons created by the legislature"). New York's prohibition against out-of-state wine producers shipping to in-state consumers, however, does not distinguish between individual or corporate citizens, and thus it applies with equal (unconstitutional) force to an individual or partnership producing wine, as it does to a corporation. In a recent Privileges and Immunities case, then-Associate Justice Rehnquist recognized that "a state may not save its discriminatory regulations by simply hiding its out-of-state discrimination behind a veil of in-state discrimination." *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 221 n.10 (1982). The converse holds true as well: A State may not smuggle past the Constitution impermissible discrimination against out-of-state citizens by including in this discrimination specific types of out-of-state citizens unprotected under the Privileges and Immunities Clause. *Cf. Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66-67 (2003) (holding that state laws lacking any express classification based on individual citizenship may be scrutinized under the Privileges and Immunities

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Orbeck, 437 U.S. 518, 531 (1978). It is no coincidence that Supreme Court cases addressing economically discriminatory regulations by the States implicate both the Commerce Clause and the Privileges and Immunities Clause. *See, e.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 570 n.4 (1997); *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208 (1982); *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), *overruled on other grounds, United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 68-69 (1824); *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Penn. 1823) (No. 3,230) (Washington, Circuit Justice). Even in cases involving only the Privilege and Immunities Clause, this Court has often relied on and "dr[awn] from the reasoning of several Commerce clause cases." *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F. Supp. 1287, 1300 (E.D. Vir. 1982) (citing cases). *See also Hicklin*, 437 U.S. at 531-32 (relying on Commerce Clause cases to assess Privileges and Immunities claim although "appellants raise no Commerce Clause challenge").

The omnipresence of these two constitutional provisions in challenges to economic discrimination between the States exposes the "fatal defect" in New York's argument. *Bacchus Imports, Inc. v. Dias*, 468 U.S. 263, 276 (1984). The Privileges and Immunities Clause reinforces the Commerce Clause in securing comity and nondiscrimination in

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Clause if the statute's terms "are but proxies for differential treatment against out-of-state residents").

interstate commerce. *See Ward*, 79 U.S. (12 Wall.) at 430 (holding that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business"). Thus, New York's argument that the Twenty-First Amendment immunizes it from constitutional scrutiny under the Commerce Clause also implies immunity from the Privileges and Immunities Clause. But to claim that palpable discrimination is immunized from constitutional scrutiny is anathema.[4] *Cf. Craig v. Boren*, 429 U.S. 190, 205 (1976) (holding that the Twenty-First Amendment does not shield discriminatory State regulations of alcohol from scrutiny under the Equal Protection Clause). *See also Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 331-32 (1964) (rejecting as "an absurd oversimplication," "patently bizarre," and "demonstrably incorrect," a State's claim "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever the regulation of intoxicating liquors is concerned").

This Court has long recognized "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause – a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Hicklin*, 437 U.S. at 531-32. Contemporary scholarship on the purpose of the Privileges

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[4] The Founders' express intent favoring national uniformity in interstate commerce and nondiscrimination between the States is omnipresent in the Constitution, regardless of whether it is implied in the grants of power to Congress in Article I, § 8, or is expressly enumerated in Article I, § 10, and in Article IV.

and Immunities Clause in Article IV, § 2 confirms this "mutually reinforcing relationship" with the Commerce Clause.[5] *Id.* These two central constitutional provisions – an express restraint on State power with a concurrent grant of power to the national government – serve the Founders' express policy of national uniformity and nondiscrimination in all commercial relations between the

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[5] *See, e.g.*, Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 San Diego L. Rev. 809, 854 (1997) (recognizing that "the purpose the [Privileges and Immunities] Clause was to effect greater commercial union among the citizens of all of the states"); George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 Iowa L. Rev. 351, 353 (1988) (suggesting that "the privileges and immunities clause was meant to act as an agreement or treaty, among the states, not to discriminate against trade or business enterprises on the basis of out-of-state residence"); Note, *Defining the Scope of the Article Four Privileges and Immunities Clause*, 54 U. Cin. L. Rev. 883, 884 (1986) (recognizing that "the privileges and immunities clause and the Commerce clause.... were meant to interdict state discrimination against nonresidents that would divide the union to the detriment of the common good"); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425, 446-47 (1982) (favoring the Privileges and Immunities Clause's "express commands" against "the problem of commercial isolationism" over the dormant Commerce Clause doctrine, which is derived from "the silences of Article I"); Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 384 (1979) (noting that "the privileges and immunities clause ... was drafted with interstate harmony and cooperation in mind"). One recent article unintentionally affirms the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause by explaining how one clause cannot do all of the work of the other. *See* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause*, 88 Minn. L. Rev. 384 (2003) (discussing some of the doctrinal differences, such as in the protection of corporations, between the Commerce Clause and the Privileges and Immunities Clause).

States. As the following sections make clear, they share the *same* history, textual source, and function.

It is true that "a constitutional adjustment in the allocation of authority between the federal and state governments" resulted with the enactment of § 2 of the Twenty-First Amendment, which permits States to control importation of alcoholic beverages into their respective jurisdictions. Laurence Tribe, *American Constitutional Law* 475 (2d ed. 1988). But New York may not exploit this express grant of power in the Twenty-First Amendment as a pretext for discrimination. *Id.* at 477-78 ("the amendment does not give blanket power to the states"). *See Craig*, 429 U.S. at 204 (holding that the Twenty-First Amendment is not a safe harbor from judicial scrutiny under the Equal Protection Clause of "invidious . . . discrimination"). New York's discriminatory licensing scheme is not only unsupported by the text and history of § 2 of the Twenty-First Amendment,[6] it is adverse to the Founders'

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[6] New York proffers a self-serving myth of unbridled State power in the regulation and control of the "importation . . . of intoxicating liquors," U.S. Const. amend. XXI, § 2. If § 2 were intended to annul the far-reaching and well-ensconced constitutional norm of nondiscrimination and interstate comity, it would have expressly stated that a State's control of the "importation of intoxicating liquors is valid regardless of any discrimination imposed by a State under this provision." Section 2 does not say anything of the sort.

When placed in its proper historical context, § 2 of the Twenty-First Amendment simply preserves for a State the power to regulate or prohibit *all* manufacture, sale, and consumption of alcohol within its jurisdiction, ensuring that out-of-state producers and merchants have to play by the same rules as their in-state counterparts. Commerce Clause and Privileges and Immunities Clause jurisprudence required this express grant of power to the States, as the States who wished to go "dry" in the late nineteenth century found their efforts frustrated by these constitutional provisions. As Thomas Cooley reports, a State that wished "*altogether* to prohibit the manufacture and sale of intoxicating

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primary concern that the Constitution snuff out the interstate discrimination running riot under the Articles of Confederation. *Zobel*, 457 U.S. at 72 (O'Connor, J., concurring) (noting that discrimination against out-of-state residents "conflicts with the constitutional purpose of maintaining a Union rather than a mere 'league of States'") (quoting *Paul*, 75 U.S. (8 Wall.) at 180).

II. The Privileges and Immunities Clause, as the Commerce Clause, Secures Each Citizen's Right to Engage in Interstate Commerce by Preventing Discrimination Between Citizens of the Several States.

A. Economic Discrimination Between the States Was Rampant Under the Articles of Confederation.

The Constitution's standardization of interstate commerce arose from the failure of the Articles of Confederation

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drinks as a beverage" often found its attempt to do so "assailed as violating express provisions in the national Constitution, and also as *subversive of fundamental rights*, and therefore not within the grant of legislative power [to the States]." Thomas M. Cooley, *A Treatise on Constitutional Limitations* 718 (5th ed. 1883) (emphases added). *See Corfield*, 6 Fed. Cas. at 551 (describing the rights protected under the Privileges and Immunities Clause as those "which are, in their nature, fundamental"). But Cooley recognized that such regulations are permissible if "[t]hey are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances." *Id.* at 720. In other words, § 2 of the Twenty-First Amendment secures for the States the right to restrain within their respective jurisdictions *all* intrastate and interstate traffic in alcoholic beverages under their inherent police power to prevent intemperance, crime, and the other evils that this Court has recognized as the "core concerns" of the Twenty-First Amendment. *Bacchus Imports, Ltd.*, 468 U.S. at 276.

to promote a unified and peaceful economic union. Under the Articles, the national government lacked meaningful authority to enforce its mandates, and despite aspirational provisions promoting interstate commercial comity, States adopted their own parochial monetary, manufacturing, and commercial regulations.

The result was economic bedlam. Justice Story, for instance, reports that under the Articles of Confederation, "[m]easures of a commercial nature, which were adopted in one state from a sense of its own interests, would be often countervailed or rejected by other states from similar motives." 1 Joseph Story, *Commentaries on the Constitution of the United States* 239 (1833). "Such a state of things gave rise to serious dissensions among the states themselves. The difference in regulations was a perpetual source of irritation and jealousy. . . . and thus state animosities and local prejudices were fostered to a high degree. . . ." *Id.* at 240. *See also The Federalist No. 7*, at 63 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that "regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. . . . naturally lead to outrages, and these to reprisals and wars").

In *Ward v. Maryland*, this Court recounted this history in ascertaining the origin of the Privileges and Immunities Clause. Justice Clifford noted that "[i]nequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system." 79 U.S. (12 Wall.) 418 at 431. Justice Clifford continued: "[T]he framers of the Constitution intended to remove those great evils" in adopting provisions forbidding

Congress or the States "to make any discrimination in enacting commercial or revenue regulations." *Id.*

B. The Privileges and Immunities Clause and the Commerce Clause Were Adopted in the Constitution to Secure Harmony and Non-discrimination in Interstate Commerce.

Interstate economic discrimination created the political crisis that led to the 1787 Federal Convention, and to a new Constitution intended to redress this economic and political chaos.[7] *See* Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 463-67 (1969) (describing how State economic regulations created a fundamental political crisis); 3 M. Farrand, *Records of the Federal Convention* 642-43 (1911) (reporting Benjamin Franklin's support for the new Constitution because "our States are on the point of separation, only to meet hereafter for the purpose of cutting one another's throats"). As Justice Denio of the New York Court of Appeals declared in the

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[7] The Federal Convention was actually born of a meeting in 1786 between five States looking "to discuss ways to *reduce trade barriers* between the states. At this meeting the call was made for a larger meeting in Philadelphia in the following year to discuss more general problems with the Articles of Confederation." Dwight R. Lee, *The Political Economy of the U.S. Constitution, in The Foundations of American Constitutional Government* 127, 129-30 (Robert D. Gorgoglione ed., 1996) (emphasis added).

It is, therefore, unsurprising that commerce and its political implications is a recurring theme in *The Federalist*. *See, e.g.*, *The Federalist No. 4*, at 46-47 (John Jay); *The Federalist No. 6*, at 56-60 (Alexander Hamilton); *The Federalist No. 7*, at 62-63 (Alexander Hamilton); *The Federalist No. 11*, at 84-91 (Alexander Hamilton); *The Federalist No. 12*, at 91-96 (Alexander Hamilton); *The Federalist No. 22*, at 143-452 (Alexander Hamilton); *The Federalist No. 42*, at 267-69 (James Madison).

preeminent Privileges and Immunities case, *Lemmon v. People*: "The Constitution organized a still more intimate Union, constituting the States, for all external purposes, and for certain enumerated domestic objects, a single nation." 20 N.Y. 562, 608 (1860).

1. The Founders' Express Intent.

This history is often called upon to explain the basis and function of the Commerce Clause, which, as aptly described in *Bacchus Imports, Inc. v. Dias*, was adopted to "prevent economic Balkanization" among the States. 468 U.S. at 276. This is not a modern insight. The Founders believed the primary function of the Commerce Clause was to restrain State power to impose discriminatory regulations on interstate commerce.[8] James Madison wrote that this central provision of the Constitution

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[8] As noted, securing unrestrained interstate commerce is a fundamental constitutional norm. George Washington emphasized the intimate connection between free-flowing interstate commerce and the preservation of the union in his famous 1797 Farewell Address: "The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism, more than any other appellation derived from local discriminations. . . . [E]very portion of our country finds the most commanding motives for carefully guarding and preserving the union of the whole. The North, in an *unrestrained intercourse* with the South, *protected by the equal laws of a common government*, finds, in the productions of the latter, great additional resources of maritime and commercial enterprise, and precious materials of manufacturing industry. The South, in the same intercourse, benefiting by the agency of the North, sees its agriculture grow, and its commerce expand. The East, in like intercourse with the West, already finds . . . a valuable vent for the commodities it brings from abroad, or manufactures at home. The West derives from the East supplies requisite to its growth and comfort." George Washington,

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> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.[9]

3 M. Farrand, *Records of the Federal Convention* at 478. *See also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting same except for last clause).

Importantly, the *same* historical catalyst underlying the Commerce Clause also led to the adoption of the

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Farewell Address, *in* 4 Annals of Cong. 2871-72 (1797) (emphases added).

[9] Such sentiments were not unique to Madison. In the debate over a draft version of the Commerce Clause, General Charles Cotesworth Pinckney recognized that prejudices between the States abounded, but in "considering . . . the interest the weak Southn. States had in being united with the strong Eastern States, he thought it proper that no fetters should be imposed on the [federal] power of making commercial regulations." 2 M. Farrand, *Records of the Federal Convention* at 449-50. Earlier in the Convention, in response to Roger Sherman's claim that "[t]he States will never give up all power over trade," *id.* at 361, Madison steadfastly maintained that "we aught to be governed by national and permanent views" on the subject of both foreign and interstate trade. *Id.* James Wilson concurred, acknowledging that in "favoring the general power over exports therefore, he opposed the particular interest of his State." *Id.* at 362. While not a delegate at the Federal Convention, Thomas Jefferson, a strong State rights advocate, wrote as early as 1785 that he supported efforts to "take the commerce of the states out of the hands of the states, and to place it under the superintendence of Congress." David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 92 (1994) (quoting letters to Richard Price and James Monroe). Jefferson believed the principal defect in the Articles was its failure to provide Congress with the authority to regulate commerce. *Id* at 91.

Privileges and Immunities Clause. In criticizing the New Jersey Plan – an early draft constitution – Madison highlighted the problem of interstate discrimination as a justification for robust national protection of citizens' privileges in interstate transactions:

> Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens (of other States) are entitled to equality of privileges by the Articles of Confederation.

Austin v. New Hampshire, 420 U.S. 656, 661 n.5 (1975) (quoting 1 M. Farrand, *Records of the Federal Convention* at 317). Whether the Founders called discrimination between the States an "injustice" or a "trespass," the goal of the resulting constitutional provisions, particularly the Commerce Clause and the Privileges and Immunities Clause, was the same: Discrimination in interstate commerce on the basis of citizenship or residency[10] was strictly forbidden.

Beyond their genesis in the same historical problem, the Commerce Clause and the Privileges and Immunities Clause also shared the same *textual source* in the unavailing Articles of Confederation. *See Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 379-80 (1978) (noting that "[t]he Privileges and Immunities Clause originally was not isolated from the Commerce Clause," and that in "the Articles of Confederation, where both Clauses have

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[10] "Citizen" and "resident" are synonymous for purposes of the Privileges and Immunities Clause. *Austin*, 420 U.S. at 663 n.8.

their source, the two concepts were together in the fourth Article"). The fourth article in the Articles of Confederation contained both the Commerce Clause and the Privileges and Immunities Clause, further evidencing the Founders' intent that these two clauses jointly serve "to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union." *Id.* at 379 n.17 (quoting fourth article in the Articles of Confederation).

More importantly for illustrating the textual foundation of the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause, *Hicklin*, 437 U.S. at 531, the portion of the fourth article of the Articles of Confederation that was transformed into the Commerce Clause was itself framed in terms of the Privileges of Immunities Clause: "[T]he people of each State shall have free ingress and regress to and from any other State and *shall enjoy therein all the privileges of trade and commerce. . . .*" *Baldwin*, 436 U.S. at 379 n.17 (emphasis added). The "norm of comity" between the States secured by the Privileges and Immunities Clause, *Austin*, 420 U.S. at 660, applies to all interstate transactions – including commerce. *See Paul*, 73 U.S. (8 Wall.) at 180 (observing that it "was undoubtedly the object of the [Privileges and Immunities] clause in question to place the citizens of each State upon the same footing with citizens of other States").

The splitting of the fourth article in the Articles of Confederation into separate clauses in the Constitution reflects only the Founder's desire for precision and clarity.

The division is in form, not substance.[11] As the Commerce Clause language is an express *grant of power* to Congress and the Privileges and Immunities Clause language is an *express limitation* on State power, the Founders separated them accordingly. *Baldwin*, 436 U.S. at 379-80. *Cf. United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. at 220 (Rehnquist, J.) (distinguishing "implied restraint" of the Commerce Clause and "direct restraint" in the Privileges and Immunities Clause). In this way, these two clauses better secure the goal of the Constitution in both proscribing economic discrimination between the States and promoting interstate harmony.

2. Supreme Court Jurisprudence and Constitutional Scholarship.

This Court expressly recognized the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause, *Hicklin*, 437 U.S. at 531, in the seminal 1868 case, *Paul v. Virginia*. There, Justice Field cited with approval New York Court of Appeals Justice Denio's opinion that the Privileges and Immunities Clause was intended "to secure a community

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[11] Charles Pinckney stated at the Federal Convention: "The 4th article, respecting the extending [of] the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, *Records of the Federal Convention* at 112. *See also Austin*, 420 U.S. at 661 (noting that the "[f]ourth article carried over into the comity article of the Constitution in briefer form but with no change of substance or intent"). Pinckney is "generally recognized as the author of the Constitution's privileges and immunities clause." Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, at 383.

of intercourse."[12] *Lemmon*, 20 N.Y. at 607 (referencing the precursor to Art. IV, § 2, in the fourth article of the Articles of Confederation). *See also Paul*, 75 U.S. (8 Wall.) at 180 (citing *Lemmon* for the proposition that "no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this"). As Justice Field further explained: The Privileges and Immunity Clause "inhibits discriminating legislation against [citizens of] other States," and that "without some provision of the kind . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul*, 75 U.S. (8 Wall.) at 180.

Justice Field's construction of the Privileges and Immunities Clause was not novel. Justice Washington presaged Justice Field's view of the Privileges and Immunities Clause more than forty years earlier in the equally famous case, *Corfield v. Coryell*, observing that Article IV, § 2, "was manifestly calculated (to use the expression of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and *intercourse* among the people of the different states of the Union.'" 6 Fed. Cas. at 552 (emphasis added). *See also Lemmon*, 20 N.Y. at 627 (Wright, J.) (explaining that the Privileges and Immunities Clause "was intended to guard against a State discriminating in

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[12] In the eighteenth and nineteenth centuries, the term "intercourse" was sometimes used as a synonym for "commerce." *See Gibbons*, 22 U.S. (9 Wheat.) at 189 (noting that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse"). *See also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 113 (2001) (quoting Samuel Johnson's 1785 Dictionary of the English Language).

favor of its own citizens"). And Alexander Hamilton praised the Privileges and Immunities Clause in *Federalist No. 80* as "the esteemed basis of the Union" because it secured "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled." *The Federalist No. 80*, at 478. As one Congressman in 1866 declared with poetic flourish: The Privileges and Immunities Clause in Article IV, § 2, is "the palladium of equal fundamental civil rights for all citizens." *Dickerson v. Bailey*, 336 F.3d 388, 403 n.67 (5th Cir. 2003) (quoting Cong. Globe, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence)).

Nineteenth-century constitutional scholars likewise shared in this common understanding of the purpose of the Privileges and Immunities Clause as securing nondiscrimination in interstate commerce. Justice Story believed that, but for the Privileges and Immunities Clause, "the States would be at liberty to make laws, giving preferences of rights and offices, *and even privileges in trade and business*, to those, who were Natives, over all other persons, who belonged to other States." Joseph Story, *A Familiar Exposition of the Constitution of the United States* 291 (1840) (emphasis added). Such "*invidious discriminations* between citizens of different States. . . . would have a tendency to generate jealousy and discontents, [being] injurious to the harmony of all the States." *Id.* at 291-92 (emphasis added). Chancellor Kent reported that the Privileges and Immunities Clause guarantees "if [citizens] remove from one state to another; they are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other." 2 James Kent, *Commentaries on American Law* 72 (13th ed. 1884). Finally, Thomas Cooley explained that many constitutional "provisions have for

their object to prevent discrimination by the several States against citizens and public authority and proceedings of other States," including the "provision[] that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Thomas M. Cooley, *Treatise on Constitutional Limitations* 21-23 (5th ed. 1883).[13]

In sum, given their common source in the fourth article in the Articles of Confederation and their common purpose as a remedy to the interstate economic strife plaguing the nation under the Articles, the Commerce Clause and the Privileges and Immunities Clause are both intended to enforce the constitutional norm that the States are forbidden from discriminating against citizens in interstate commerce. Regardless whether a State is restrained either by conceding to an exclusive grant of power to the national government or by accepting a restraint imposed on it that it must respect each citizen's equal rights, the policy is the same – interstate comity and nondiscrimination.

III. In Addition to Violating the Commerce Clause, New York's Discriminatory Restraint on Interstate Commerce in Wine Violates the Privileges and Immunities Clause.

Analysis under the Privileges and Immunities Clause consists of a two-step inquiry: (1) Does a State law burden

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[13] One modern commentator notes that Justice Cooley expressly maintained that the Privileges and Immunities Clause and the Commerce Clause "were designed to facilitate commerce among the states." Smith, *The Privileges and Immunities Clause of Article IV, Section 2*, at 839 n.81 (discussing Cooley's analysis of the Supreme Court's decision in *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870)).

or infringe a privilege and immunity that is secured under Article IV, § 2; and (2) if so, does the State have a "substantial reason" for the discriminatory treatment and does "the degree of discrimination bear[] a close relation" to this reason. *United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. at 218, 222 (quoting *Toomer*, 334 U.S. at 396). Given the purpose of the Privileges and Immunities Clause to protect fundamental rights, *Corfield*, 6 Fed. Cas. at 551 (describing the rights protected under the Privileges and Immunities Clause as those "which are, in their nature, fundamental"), the second prong is "substantially more rigorous" than review of State laws in other areas of constitutional law. *Austin*, 420 U.S. at 662-63.

A. The Right to Engage in Commerce is Secured Under the Privileges and Immunities Clause.

Despite some ambiguity on the fullest reach of the Privileges and Immunities Clause,[14] this Court has consistently recognized that this provision secures the right to pursue one's trade in interstate commerce. As then-Associate Justice Rehnquist explained in *United Bldg. & Constr. Trades Council of Camden County v. City of Camden*: "Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." 465 U.S. at 219 (citations omitted).

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[14] This Court has never provided a definitive list or precise definition of the specific "privileges and immunities" secured under Article IV, § 2. *Blake v. McClung*, 172 U.S. 239, 248 (1898).

In *Corfield v. Coryell*, the first decision addressing the Privileges and Immunities Clause by a Supreme Court Justice (riding circuit), Justice Washington identified in a nonexclusive list, "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise," 6 Fed. Cas. at 552. And in the preeminent twentieth-century case, *Toomer v. Witsell*, Justice Frankfurter summarized the Court's decisions, stating that "they bar a State from . . . discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens." 334 U.S. at 408 (Frankfurter, J., concurring). *See also Ward*, 79 U.S. (12 Wall.) at 430 (holding that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business"); *Valle v. Stengel*, 176 F.2d 697, 703 (3d Cir. 1949) (stating that "[i]t is clear that the Supreme Court has held that the words 'Privileges and Immunities' of Article IV, Section 2, protect the right of a citizen to engage in lawful commerce, trade or business without molestation or harassment"); *Tangier Sound Watermen's Ass'n*, 541 F. Supp. at 1298 (recognizing that the Court consistently strikes down discriminatory State statutes that "involve[] a person's 'commercial livelihood' ").

B. The Supreme Court Has Already Invalidated Under the Privileges and Immunities Clause State Regulatory Schemes Similar to New York's Discriminatory Restraint on Interstate Commerce in Wine.

This Court's 1870 decision in *Ward v. Maryland* speaks directly to the unconstitutionality of New York's

present-day discriminatory scheme. There, Maryland imposed a graduated license fee on traders working in the State based on the size of a trader's stock. Plaintiffs challenged the licensing statute as "repugnant" to both the Commerce Clause and the Privileges and Immunities Clause as it burdened out-of-state traders who wished to sell their goods in Maryland. *Ward*, 79 U.S. (12 Wall.) at 425. Such traders naturally had a larger stock than in-state traders, particularly those who sold liquors. *Id.* at 426. Thus, under Maryland's licensing statute, they would *always* pay a higher license fee than their in-state competitors, thereby undermining their ability to compete with in-state traders. The *Ward* Court held that it was unnecessary to reach the Commerce Clause claim, *id.* at 428-49, as the licensing statute was indeed "repugnant" to the Privileges and Immunities Clause. *Id.* at 429. Although there was no express discriminatory language in the licensing scheme, the Court inferred its palpable purpose in "that the statute in question does discriminate in favor of the citizens of the State." *Id.* at 426. *See Austin*, 420 U.S. at 663 (discussing *Ward* as an example of the Court's "heightened concern for the integrity of the Privileges and Immunities Clause").

The *Ward* decision is directly relevant to the instant case for two reasons. First, this Court explicitly rejected the *same* alleged justification proffered today by New York. Maryland's Attorney General argued before the *Ward* Court that "[t]here is nothing in the law which prohibits or restrains non-resident merchants, manufacturers, or traders or their agents, from bringing their goods here and selling them . . . as residents of the State." 79 U.S. (12 Wall.) at 422. Similarly, the Second Circuit approved New York's direct-shipment licensing

scheme in the instant case because it did not prohibit out-of-state wine producers from becoming *de facto* New York residents. *See Swedenburg*, 358 F.3d at 237 (describing the requirement of New York's direct shipment statute that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license *as long as the winery establishes a physical presence in the state*") (emphasis added). The *Ward* Court rejected Maryland's excuse, recognizing its licensing scheme as invalid interstate discrimination under the Privileges and Immunities Clause. This Court should reject New York's identical attempt today to acquit itself of its constitutional obligations to respect its sister States and their citizens. *Cf. Hicklin*, 437 U.S. at 524-25 (recounting the facts and holding of *Ward* as "strongly support[ing]" the Petitioners' successful Privilege and Immunities claim).

Nor can New York argue that the Twenty-First Amendment effected a wide-ranging and momentous constitutional transformation, prohibiting judicial scrutiny of interstate discrimination on alcohol imports. In essence, New York would have this Court accept that the Twenty-First Amendment has *pro tanto* repealed every clause of the Constitution proscribing interstate discrimination with respect to alcoholic beverages. Thus, New York asserts that this Court must turn a blind eye to its interstate economic discrimination, no matter how egregious, because the subject matter is somehow related to alcohol. *See Swedenburg*, 358 F.3d at 238 (recognizing that "the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol").

This Court's Twenty-First Amendment jurisprudence forecloses this argument. First, in *Hostetter v. Idlewild*

Liquor Corp., this Court labeled as "an absurd oversimplification," "bizarre," and "demonstrably incorrect," a State's argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever the regulation of intoxicating liquor is concerned." 377 U.S. at 331-32. Second, and more recently, this Court held that states may control imports of alcoholic beverages only when such controls serve one of the "core concerns" of the Twenty-First Amendment, such as temperance. *Bacchus Imports, Ltd.*, 468 U.S. at 276. *See also Dickerson*, 336 F.3d at 404 (reviewing Supreme Court and Fifth Circuit cases applying the "core concerns" test under the Twenty-First Amendment). The reason for the *Hostetter* Court's strong language and the *Bacchus* Court's express recognition of temperance as the "core concern" of the Twenty-First Amendment is straightforward: This Court recognized the implications of unbridled State power to discriminate in interstate commerce in alcoholic beverages. Such a construction of the Twenty-First Amendment fundamentally conflicts with the Commerce Clause, the Privileges and Immunities Clause, and the very concern of the Founders about interstate discrimination that gave birth to the Constitution.

The second reason why this Court should look to *Ward* as determinative is that Justice Bradley's concurrence in *Ward* reiterates the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause. *Hicklin*, 437 U.S. at 531. As noted above, Justice Clifford's opinion for the Court recognized that there was a Commerce Clause problem with Maryland's discriminatory licensing scheme, but he did not consider it necessary to reach this issue as the Privileges and Immunities claim was dispositive. Justice Bradley,

though, felt it necessary to emphasize in a brief concurrence that Maryland's scheme was indeed "in violation of the commercial clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States." *Ward*, 79 U.S. (12 Wall.) at 432 (Bradley, J., concurring). Directly paralleling New York's requirement for out-of-state citizens and wineries today, Justice Bradley summarized the constitutional defect in Maryland's licensing statute: "Such a law would effectually prevent the manufactures of the manufacturing States from selling their goods in other States unless they established commercial houses therein, or sold to resident merchants who chose to send them orders." *Id.* Justice Bradley thus confirmed that Maryland's scheme violated *both* the Commerce Clause and the Privileges and Immunities Clause by imposing discriminatory and protectionist restraints on interstate commerce. The same must be said of New York's discriminatory prohibition here – particularly since New York permits *in-state* residents to engage in commercial activity prohibited to *out-of-state* residents. *See United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. at 208 (citing *Ward*, among numerous other cases, for the proposition that the Privileges and Immunities Clause protects a citizen's "basic and essential activity" in the "pursuit of a common calling").

Finally, the non-deferential scrutiny applied in *Toomer v. Witsell* should likewise be applied to New York's licensing scheme today. Similar to New York's arguments before the Second Circuit, South Carolina claimed in *Toomer* a valid constitutional purpose in enacting a statute that discriminated against out-of-state citizens. *Toomer*, 334 U.S. at 398 (noting South Carolina's "argument assumes

that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause"). *See Swedenburg*, 358 F.3d at 237-38 (accepting New York's assertion that its prohibition against direct-to-consumer imports is necessary to ensure "accountability" in alcohol distribution in the State). As in *Ward*, the *Toomer* Court rejected South Carolina's purported justification for discrimination: "We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger presented by noncitizens, as a class, and the severe discrimination practiced upon them." *Toomer*, 334 U.S. at 399.

Toomer reminds the States that their statutes are not entitled to deferential review under the Privileges and Immunities Clause, as permitting the States to discriminate against the right to engage in interstate commerce would undermine one of the primary justifications for the Constitution. As this Court recognized in *Austin v. New Hampshire*, given "the individual's right to nondiscriminatory treatment" and "the structural balance essential to the concept of federalism" inherent in the Privileges and Immunities Clause, the standard of review is "*substantially more rigorous*" than in other constitutional areas, such as reviewing an exercise of a State's power to tax. *Austin*, 420 U.S. at 662-63 (emphasis added).

Thus, under § 2 of the Twenty-First Amendment's grant of power to New York to control imports of alcoholic beverages, this Court should demand that New York adduce evidence that its discrimination against out-of-state citizens' right to trade with New York consumers "bears a close relation," *Toomer*, 334 U.S. at 396, to the "core concerns" of the Twenty-First Amendment. *Bacchus Imports, Ltd.*, 468 U.S. at 276. New York failed to – and

cannot – produce such evidence, and its conclusory assertion of "accountability" fails its burden under the Privileges and Immunities Clause. This Court again should refuse to close its eyes to the reality of New York's direct-to-consumer licensing statute, recognizing the "severe discrimination" imposed on out-of-state citizens seeking to engage in their right to practice their commercial calling. *Toomer*, 334 U.S. at 399.

Section 2 of the Twenty-First Amendment grants New York the power to ban all imports of alcohol as an essential element of an in-state prohibition against commerce in and consumption of alcoholic beverages, but it may not use this grant of power as a pretext for discrimination. *Cf. Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (Easterbrook, J.) (incorrectly rejecting the "core concerns" test as not reflecting the original intent of the Twenty-First Amendment, but still recognizing that Indiana may not "use[] its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states"). New York's prohibition against direct-to-consumer imports of wine should be invalidated as "repugnant" to the Commerce Clause, *Ward*, 79 U.S. (12 Wall.) at 429, and as an "invidious discrimination" that offends a fundamental privilege secured under the Privileges and Immunities Clause. Story, *A Familiar Exposition of the Constitution* at 291. The constitutional norm favoring "substantial equality" between the citizens of the several States, *Toomer*, 334 U.S. at 396, as expressed in the "mutually reinforcing relationship," *Hicklin*, 437 U.S. at 531, between the Commerce Clause and the Privileges and Immunities Clause demands no less.

CONCLUSION

For these reasons, *Amicus* urges this Honorable Court to reverse the decision below.

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

JUANITA SWEDENBURG, *et al.*,
Petitioners,

v.

EDWARD D. KELLY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits

BRIEF FOR THE WINE AND SPIRITS WHOLESALERS OF AMERICA, NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, AMERICAN BEVERAGE LICENSEES, THE PRESIDENTS' FORUM OF THE BEVERAGE ALCOHOL INDUSTRY, AND THE ASSOCIATED FOOD DEALERS OF MICHIGAN AS *AMICI CURIAE* SUPPORTING PETITIONERS IN NOS. 03-1116 & 1120 AND RESPONDENTS IN NO. 03-1274

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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INTEREST OF AMICI CURIAE

Wine and Spirits Wholesalers of America, Inc., founded in 1943, is a national trade organization representing more than 370 licensed wine and spirits wholesaler companies in 44 States, the District of Columbia, and Puerto Rico that hold state licenses to act as wine and/or spirits wholesalers. The National Association of Beverage Importers, Inc. is a national trade association that represents the interests of beer, wine, and spirits importers. American Beverage Licensees, Inc. is an association representing the interests of beer, wine, and spirits retailers. The Presidents' Forum of the Beverage Alcohol Industry is a trade association that provides a forum for members' chief executives to respond to issues affecting the beverage alcohol industry. The Associated Food Dealers of Michigan, Inc. provides services to businesses engaged in distribution of food and other products. *Amici* and their members play significant roles in the distribution of alcoholic beverages under state licensing systems. *Amici* thus have a direct interest in the proper resolution of these cases, which involve challenges to those longstanding systems.[1]

STATEMENT

Like all States, Michigan and New York exercise strict control over the sale of alcohol within their borders. As part of their regulatory programs, each State restricts who may make retail sales to its citizens. Under Michigan law, "consumers must purchase alcoholic beverages from licensed retailers." Pet. App. (03-1116) at 5a. Licensed in-state winemakers are likewise permitted to sell at retail, although they may do so only with respect to their own products. *Id.* at 6a. Out-of-state retailers and wineries are not permitted to sell directly to Michigan consumers. *Id.* at 6a.

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[1] The parties have consented to the filing of this brief. No party authored this brief in whole or in part, and no person except *amici* and their members made a monetary contribution to the preparation or submission of this brief. *See* S. Ct. R. 37.6.

The New York retail system is similar in most, though not all, respects. New York law provides that no one may sell alcoholic beverages at retail "without obtaining the appropriate license . . . ." N.Y. Alco. Bev. Cont. Law § 100(1), quoted in Pet. App. (03-1274) at 6a. The law further provides that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages . . . ," *id.* § 102(1)(c), quoted in Pet. App. (03-1274) at 6a, effectively barring direct sales to consumers by out-of-state vendors. Licensed wineries with an in-state physical presence may sell directly to consumers. *See* Pet. App. (03-1274) at 7a-8a. Wineries that do not meet that condition may not.

Plaintiffs challenged the regulatory systems in both States on the ground that, by prohibiting direct sales from unlicensed out-of-state wineries, the States impermissibly discriminated against interstate commerce. The Sixth Circuit upheld the challenge to Michigan's law, rejecting the idea "that a state's 'virtually complete control' [*see North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (internal quotation marks omitted)] over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." Pet. App. (03-1116) at 12a. The Second Circuit took a different view with respect to the New York law. After reviewing this Court's decisions addressing the interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment, the court of appeals concluded that "New York's regulatory regime falls squarely within the ambit of Section 2's grant of authority." Pet. App. (03-1274) at 25a. The court found that the provisions limiting the privilege of direct selling to licensed in-state entities "serve[] valid regulatory interests," *id.* at 25a, "allow[ing] the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the [State Liquor Authority]." *Id.* at 25a.

SUMMARY OF ARGUMENT

The short answer to the question posed by this Court is no: the statutory scheme described in the question does not "violate the dormant Commerce Clause, in light of Sec. 2 of the 21st Amendment." Whatever may be the ultimate boundaries of state authority under the Twenty-first Amendment, that authority necessarily includes—as it has for more than seven decades—the power to limit retail sales of alcohol by out-of-state vendors that are not subject to the full extent of state regulatory and taxing powers. That conclusion controls these cases. Plaintiff out-of-state wineries are not subject to the same regulatory oversight as licensed in-state sellers, and, like other out-of-state retail liquor vendors, they have no overriding constitutional right, under the Commerce Clause or any other provision, to disregard state regulatory prohibitions on making direct sales to state citizens.

I. The theory advanced by the plaintiffs—that, if a State permits in-state vendors to sell alcohol directly to consumers, it must allow out-of-state vendors to do so as well—contradicts more than 70 years of regulatory history under the Twenty-first Amendment. During that period virtually every State has required alcohol to be sold pursuant to either a state-monopoly system or a state-licensing system, under which retail sales to consumers (that is, sales for off-premises consumption) are made by in-state vendors. Those systems were implemented after the end of Prohibition precisely to ensure that States would be able to exert the greatest possible control, both as a legal and a practical matter, over those who sold alcohol to their citizens. Given the chaotic conditions that had prevailed prior to ratification of the Twenty-first Amendment, it would be historically anomalous to conclude that States, under compulsion of the dormant Commerce Clause, have been obligated all along to allow vendors across the Nation to sell alcohol directly to consumers within their borders.

Although plaintiffs seek to portray state restrictions on out-of-state consumer sales (of which the laws now at issue are an example) as nothing more than rank favoritism, those restrictions in fact serve important state interests. To begin with, they allow state and local officials to impose necessary limits on the number of vendors licensed to sell alcoholic beverages within the State and to conduct meaningful investigations, with direct community input, regarding who those vendors will be. Furthermore, the licensed vendors' in-state locations, and the importance to them of maintaining their state-granted licenses, give the States much greater power to enforce their laws regarding illegal sales, particularly sales to minors. Finally, the restriction on sales by out-of-state vendors provides concrete assurance that those privileged to sell alcohol actually collect and remit the taxes that the laws impose. That assurance is of critical importance to the States, whose support for the Twenty-first Amendment was prompted in large part by a need for enhanced tax revenues. *See* L.V. Harrison & E. Laine, *After Repeal* 173 (1936).

Plaintiffs attempt to sidestep these state interests, arguing that "temperance" is the only legitimate interest served by the Twenty-first Amendment. Because the laws here *do* serve to inhibit sales of alcohol—especially illegal sales to underage drinkers—the argument is beside the point. But it is also incorrect. As the history of post-Prohibition regulation clearly demonstrates, Section 2 of the Twenty-first Amendment not only allowed States to ban liquor sales entirely, it enabled so-called "wet" States to blunt the harmful influence of unsupervised sellers by establishing strict local control over the sale of alcohol. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) ("core § 2 power" is power "to *regulate* the sale or use of liquor within its borders") (emphasis added). Plaintiffs' alternative vision of a nationwide retail liquor market with thousands of vendors free to

sell directly to consumers—a vision that would sound the death knell of the longstanding liquor distribution system—is flatly inconsistent with that objective.

II. Despite plaintiffs' arguments to the contrary, the dormant Commerce Clause does not prevent States from instituting local control over alcohol sales. First of all, Congress has enacted the Webb-Kenyon Act, 27 U.S.C. §§ 121-22, which (in terms similar to the Twenty-first Amendment) grants broad authority to the States to limit the "shipment or transportation" of alcohol across their borders. That provision gives a federal imprimatur to state laws barring direct out-of-state liquor sales. Furthermore, Congress extended this authority at a time when it was well aware that States were seeking to control alcohol sales by restricting shipments from out-of-state vendors. Thus, even if the dormant Commerce Clause would otherwise cast doubt on the laws at issue here, Congress has effectively overridden its limitations with respect to this kind of state regulation. *See generally Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (Congress may narrow effect of dormant Commerce Clause).

In any event, the Twenty-first Amendment itself limits the effect of the dormant Commerce Clause in these circumstances. Although the Court has rejected the proposition that "the Twenty-first Amendment . . . somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]," *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has continued to recognize that, consistent with the original understanding, "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). That principle is sufficient to decide these cases. Here, Michigan and New York have promulgated laws that are directed to the most fundamental

aspect of any "liquor distribution system": who may sell alcohol directly to their citizens. In limiting the right of direct selling to in-state entities over whom the States can exercise the greatest possible oversight, the States are employing just the kind of regulatory authority that the Twenty-first Amendment is meant to protect. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); *see also id.* at 447 (Scalia, J., concurring in the judgment).

The decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)—on which plaintiffs heavily rely—has little bearing on this particular question. That case involved neither importation nor transportation, the subjects to which the Twenty-first Amendment is principally addressed. Moreover, the State in that case defended its discriminatory law solely on the ground that, by providing a competitive advantage, it promoted local industry. While the Court found that particular interest to fall outside the scope of the Twenty-first Amendment, it specifically contrasted the greater deference that is given to "laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276. Here, the States are seeking to combat those evils, and the Commerce Clause does not bar them from doing so.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT AUTHORIZES STATES TO RESTRICT RETAIL SALES OF ALCOHOLIC BEVERAGES BY OUT-OF-STATE VENDORS

Section 2 of the Twenty-first Amendment declares that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Am. XXI, § 2. That language, on its face, indicates that the States' power to control liquor traffic by restricting importation is far-reaching. Furthermore, while this Court has said that the

Twenty-first Amendment does not give States absolute authority over all matters pertaining to alcoholic beverages, *see, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has repeatedly recognized that States may exercise extensive control over the physical distribution of liquor within their borders. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Thus, in *Midcal*, the Court observed that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." 445 U.S. at 110. Likewise, in *Capital Cities*, the Court noted that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." 467 U.S. at 712.

The cases now before the Court fit squarely within those basic principles. What is at issue is simply the authority of States to control retail sales of alcohol—that is, sales for off-premises consumption—by limiting, or even banning, direct imports to consumers by out-of-state vendors. Numerous States have exercised that authority since the end of Prohibition, and it remains a significant part of most closely-regulated liquor distribution systems today. Although plaintiffs argue that, if a State permits in-state vendors to sell directly to consumers, it must allow the same for out-of-state vendors—a theory that would effectively put an end to the traditional liquor distribution system—the limitation on direct out-of-state sales continues to serve important state interests in controlling the sale of alcohol and in assuring effective tax collection. It thus advances legitimate goals that are consistent with, and protected by, the Twenty-first Amendment.[2]

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[2] In our view, it does not matter whether the Court, in deciding the constitutional question presented here, begins with analysis under the Commerce Clause or analysis under the Twenty-first Amendment. *See*

A. The idea that States may regulate liquor traffic by restricting sales from out-of-state vendors must be understood in historical context. After the tumult of the 1920s, the end of Prohibition brought with it the difficult problem of how to regulate the newly-allowed sale of alcohol. The conditions at the time were not promising: "[W]hat Prohibition did was to transfer the manufacture, sale, and distribution of liquor from legitimate to criminal forces." P. Johnson, *A History of the American People* (1999). Thus, "[i]n the early days after repeal of prohibition the nation was infested with bootleggers and racketeers anxious to continue their trade and willing to thwart the tax and health laws." *National Distributing Co., Inc. v. U.S. Treasury Dept.*, 626 F.2d 997, 1004 (D.C. Cir. 1980). *See Fedway Associates v. U.S. Treasury*, 976 F.2d 1416, 1418 (D.C. Cir. 1992) (noting congressional concern about "corruption of the newly-legal alcohol industry by bootleggers, racketeers, and other criminal types who had flourished during Prohibition.")

It fell primarily to the States, exercising their new constitutionally-recognized powers under the Twenty-first Amendment, to bring order out of this chaos. For the States, a principal goal was to get and maintain control over who could sell alcohol, and thereby to dictate to whom (and under what conditions) they could sell it. After experiencing the lawlessness of the Prohibition era, States wanted to establish laws that were aimed at controlling the excesses of liquor traffic and, perhaps just as important, to enact laws that were

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Pet. App. (03-1274) at 12a-14a. Because we believe that state laws within the scope of the Twenty-first Amendment do not violate the dormant Commerce Clause—either because the Amendment directly limits the dormant Commerce Clause or because, in any event, it "saves" certain alcohol laws from invalidation—the order of analysis seems immaterial. In the end, proper resolution of the issue turns upon whether the state laws in question are within the scope of the Twenty-first Amendment. As we discuss, the state laws here meet that standard.

enforceable. *See* R. B. Fosdick & A. L. Scott, *Toward Liquor Control* 149 (1933) (also known as the Rockefeller Report) ("[r]estrictive laws which cannot be enforced achieve success only on paper.") Furthermore, they sought to levy taxes on the sale of liquor, an ambition that had been one of the moving forces behind the repeal of Prohibition. *See* pages 17-18 *infra*.

In this environment, States saw a particular need for stringent regulation with respect to retail sales of liquor. *See Toward Liquor Control* 65 ("[v]irtually all the individual and social evils of the liquor traffic arise from an inadequately regulated and overstimulated retail sale.") In general, the States approached the problem of regulating sales to consumers in one of two ways. Following the recommendation of the influential Rockefeller Report, approximately 15 States elected to establish state monopolies over the retail sale of alcoholic beverages. In those States, "[t]he primary task of the [State Alcohol] Authority would be the establishment of a chain of its own retail stores for the sale of the heavier alcoholic beverages by package only." *Id.* 64-65. Some States, while generally following the monopoly model, provided for sales of specified products (often wine or beer) by state-licensed entities. *See* L. V. Harrison & E. Laine, *After Repeal* 110-11 (1936). By vesting control in the State itself, the monopoly system of retail distribution naturally tended to preclude direct sales to consumers by out-of-state liquor vendors.

The remaining non-dry States followed a second course—also recommended by the Rockefeller Report (but with misgivings that it would not be rigorous enough), *see Toward Liquor Control* 55-61—that focused, not upon state proprietorship, but upon strict regulation and licensing of private vendors. This system, then known as the licensing system, established a three-tier method of distribution. Under that system, producers were required to sell to licensed whole-

salers, who sold in turn to licensed retailers. *See generally McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 24 n.3 (1990) (describing three-tier system in Florida). Under this type of system, the States closely monitored both wholesalers and retailers, and only licensed retailers were permitted to sell to consumers for off-premises consumption.

The licensing system, again, did not contemplate direct interstate sales to state consumers. To the contrary, it was founded on principles of tight state, and often local, control. In particular, States and local governments sought to exert control with regard to the physical locations at which liquor would be available. Thus, for example, the authors of the Rockefeller Report stated that "[s]uitable restrictions should be established by the license law or by administrative regulation with respect to the number and character of *places* where liquor may be sold." *Toward Liquor Control* 44. The authors further recommended that "[l]icenses issued for the retail sale of liquor should run not only to the person who sells, but to the *premises* where the liquor is sold," *id.* 49, thereby making revocation of the seller's license a more powerful enforcement tool. The licensing States generally followed this regulatory blueprint. *See* B. Bernard, *Liquor Laws* 26 (1949) ("[a] license to sell alcoholic beverages" provides authority to sell alcohol "in the premises set forth by address or other description.")

The importance of local control was reinforced in many licensing States by a further restriction: that retail licenses would be issued only to residents of the State or to corporations with resident officers or shareholders. *See Liquor Laws* 25-26; *see also* Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959). Indeed, in some places, state laws required residence in the county or town where the retail business was located. *See*

Liquor Laws 25-26. These laws plainly assisted authorities in evaluating the qualifications of licensees, providing a greater likelihood that applicants would be known to the community in which they sought to operate. *See After Repeal* 74-75 ("[t]wo processes are involved in determining the propriety of issuing licenses, the investigation of applicants and of the premises for which the licenses are requested, and the obtaining of community sentiment toward proposed liquor businesses.") Although it is not clear whether the residence qualification was necessary to other regulatory objectives—given the extensive regulatory control already available over the licensee and the premises themselves—it was accepted as a common feature of post-repeal regulatory schemes. Indeed, in an early case before this Court, its constitutionality was regarded as a given. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936) (discussed at page 22 *infra*).

Finally, the States bolstered local control by imposing direct bans on retail shipments from out-of-state vendors. *See* Shankar, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353, 356 (1999) ("States . . . passed direct shipment laws to protect the three-tier system, which otherwise could be bypassed by interstate shipment of alcohol from producers directly to consumers.") These laws did not prevent all importation of out-of-state products, but rather required that the products be distributed through the three-tier system. *See id.* at 355. In those States, the three-tier system thus served several related regulatory purposes. Not only did it protect against the notorious "tied house" between producer and retailer—*see Toward Liquor Control* 43 ("[t]he 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community.")—but it assured that direct sales to consumers would be made by licensed local merchants.

Following the end of Prohibition, therefore, it was widely understood that retail sales of liquor, far from being part of a wide-open national marketplace, instead were subject to strict state and local control. *See generally Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring) ("local, not national, regulation of the liquor traffic is now the general constitutional policy.") After ratification of the Twenty-first Amendment, the States took steps to assure that, if the State was not itself the direct seller of liquor, it was at least in a position to exercise the greatest possible authority over the direct seller. No one expected that outlets in California or Illinois would be free to sell liquor directly to consumers in Michigan or New York. To the contrary, that kind of unrestrained distribution scheme, with thousands of potential sellers scattered about the Nation, was precisely what the States were seeking to foreclose.

While contemporaneous practice does not conclusively establish constitutionality, the historical evidence at least demonstrates that those enacting alcohol laws after ratification of the Twenty-first Amendment regarded limitations on retail sales by out-of-state vendors as entirely natural and legitimate under its terms. *See Alcohol Direct Shipment Laws*, at 355 (noting that laws against direct shipment have existed "in many states since the repeal of Prohibition.") Indeed, if the Twenty-first Amendment had not countenanced such restrictions, the regulatory systems of most States would have immediately been constitutionally suspect—under plaintiffs' theory of compulsory equal treatment for out-of-state retail sellers—even though they were designed to serve well-recognized, and widely heralded, regulatory goals. That is an implausible conclusion. In their efforts to clean up the liquor traffic, the States were entitled to limit direct sales by out-of-state vendors precisely because their location outside the particular regulating State made them less susceptible to the reach of that State's power.

That principle applies with full force to the laws challenged here. Although plaintiffs try to limit the focus of these cases to sales of wine alone, the distinction that they attack—between direct sales by in-state wine producers (allowed) and direct sales by out-of-state wine producers (prohibited)—is, at bottom, nothing more than an example of the larger distinction made between in-state and out-of-state retail sellers generally. Like other in-state retailers, licensed in-state wine producers are, by virtue of their situs, subject to the complete regulatory and taxing authority of their home States. By contrast, like other out-of-state retailers, out-of-state wine producers tend to operate largely beyond the authority of the individual States in which they now seek to retail their products. That difference, in our view, is decisive. Under the Twenty-first Amendment, a State seeking to control the liquor traffic within its borders need not allow retail sales by out-of-state dealers over whom it has less than full regulatory authority.[3]

B. The Commerce Clause, of course, generally discourages lines drawn between in-state and out-of-state businesses. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). But that rule has a diminished effect where regulation of liquor distribution is in question. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Twenty-first Amendment primarily created an exception to the normal operation of the Commerce Clause."); *see also* pages 21-29 *infra* (discussing effect of Twenty-first Amendment on dormant Commerce Clause). Although the dormant Commerce Clause still prohibits certain forms of pure "economic protectionism," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), it

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[3] We note that any attempt by plaintiffs to fashion a wine-specific constitutional rule would run head-long into the language of the Twenty-first Amendment, which explicitly refers to "intoxicating liquors" without making any distinctions. *See also* 27 U.S.C. § 122 (Webb-Kenyon Act) ("vinous . . . or other intoxicating liquor of any kind.")

necessarily accommodates state regulations that are designed to promote legitimate interests protected by the Twenty-first Amendment. Limitations on out-of-state retail sales directly serve those interests.

1. To begin with, the capacity to limit direct out-of-state sales allows States to exercise the greatest possible influence over the lawful sale of liquor to their citizens. Most immediately, it gives a State the threshold power to determine how many retail liquor sellers there will be. No State allows everyone who wants to sell liquor to do so: rather, in most States, licenses have long been rationed in accordance with population and local preferences. *See After Repeal* 50; *Liquor Laws* 15-17. Although the laws and practices vary among different States, it is common for States to allow local communities to have a say (or even a veto) about the grant or renewal of licenses in their vicinity. As a result, both state and local governments are able to prevent the unrestrained proliferation of retail outlets. By contrast, if States had to allow retail sales by any and all liquor vendors nationwide—as plaintiffs insist—the benefits gained by limiting the number of liquor licenses would necessarily be lost.[4]

The States also have an important interest in knowing as much as possible about who will be selling alcohol to their citizens. A central part of the traditional licensing system has always involved a detailed investigation into the qualifications and character of persons entitled to sell liquor in a

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[4] Although States theoretically could impose limits by apportioning licenses between in-state and out-of-state businesses, that solution would only make matters worse. Given the vastly greater number of potential out-of-state sellers, any proportional system (*i.e.*, any system that did not "favor" local applicants) would be severely weighted towards out-of-state sellers, undermining state efforts to impose enforceable restrictions on their licensees. It would also reduce dramatically the incidence of face-to-face transactions between buyers and sellers, thus interfering with enforcement of laws against prohibited sales.

particular community. Indeed, early observers of state regulatory systems remarked that "retail licensing" was "the most important field of licensing activity." *After Repeal* 52. Thus, for example, notices are typically posted *on site* whenever a retail seller seeks to obtain, renew, or transfer a retail liquor license, permitting those in the surrounding community to voice concerns about issuance of the license generally or about the prospective licensee in particular. To compel a State to review and investigate applications from all willing sellers everywhere—or to rely on investigations by other States applying their own criteria—would impose a significant, and undesirable, reworking of the present locally-based system. *See* Pet. App. (03-1274) at 28a.

The local licensing system not only addresses who may sell liquor, it also leads to better control over who may buy it. After Prohibition, experts took the view that "[w]hen liquor licenses are placed in the hands of trustworthy and competent persons the likelihood of subsequent liquor troubles is greatly reduced." *After Repeal* 74. In particular, the selection of licensees is part of the process for seeing that state laws barring sales to minors and the intoxicated are observed. From the ratification of the Twenty-first Amendment to the present day, all States have had laws prohibiting sales to minors. *See U.S. Dept. of Commerce, State Liquor Legislation* 156-63 (1941); *Liquor Laws* 59. Virtually all States have restrictions on sales to intoxicated persons as well. *See State Liquor Legislation* 156-63.

Proper enforcement of these laws, though concededly challenging, remains a state interest of the highest importance. But that enforcement necessarily begins with the expectation that sellers will refuse to sell to those who are not permitted to buy. To back up that expectation, States must wield (and use) the threat that state-issued licenses will be suspended or revoked for noncompliance. *See After Repeal* 215 ("[r]evocation is the only reliable complete remedy for

violations . . . .") Thus, if in-state sellers violate the State's alcohol control laws, they face the loss of their right to sell and, often, of their businesses: for example, in-state wineries would, at a minimum, forfeit their opportunity to sell directly to consumers. The stakes of noncompliance would be very different, however, for national retailers. National retail vendors, doing business across a wide spectrum of States, would have the capacity to spread, and thus minimize, the risk of disregarding state laws. As a result, even if nationwide vendors could be compelled to get licenses for each State in which they sold (a point that is by no means certain), the potential loss of any single state license, and the inability to sell directly in that State alone, would be relatively unimportant.

Finally, as both a practical and legal matter, in-state sellers are subject to far greater ongoing administrative oversight. *See* Pet. App. (03-1274) at 25a ("[p]resence ensures accountability.") By the very fact that licensees are physically located in the regulating State, enforcement officials can more readily investigate, through direct observation, whether they are conforming to the requirements of state law. *See generally Duckworth v. Arkansas*, 314 U.S. 390, 396 (1941) (noting "peculiar difficulties of controlling [intoxicating liquor]").[5] In addition, state laws call for licensed sellers to keep detailed records on site, which are subject to review by state regulatory officials. By contrast, if State enforcement officials were forced to monitor and inspect a myriad of sellers in all other States, that administrative exercise, even if legally permissible, would be both highly impractical and needlessly costly. *See* Pet. App. (03-1274) at 28a.

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[5] Even without nationwide retail sales of alcoholic beverages, Congress has recognized the difficulties that States face in seeking to enforce their liquor laws against out-of-state entities. *See* The Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (providing federal jurisdiction for suits by state attorneys general).

2. The limitation of out-of-state retail sales is also important to another critical objective of alcohol control laws: effective tax collection. Indeed, while plaintiff wineries apparently suggest that they would be willing to collect and remit applicable taxes, they can hardly speak for all liquor vendors across the Nation, many of whom would presumably try to gain a competitive advantage by skirting state tax systems. As the Seventh Circuit has observed, "states have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). Thus, even if the States may constitutionally impose their alcohol taxes on sales by out-of-state retailers, *but see Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the practical difficulties of enforcement would be enormous.

Advocates of nationwide sales thus choose a different tack, arguing that the problem of tax collection exists with respect to all direct out-of-state sales, not just sales of alcohol. *See, e.g., Alcohol Direct Shipment Laws*, 85 Va. L. Rev. at 358. Their point appears to be that the Court should not give weight to a concern about collection of state alcohol taxes because that concern, taken to its logical conclusion, would allow States to restrict direct out-of-state sales of *any* product. *See id.* But the history of the Twenty-first Amendment is again relevant here. For taxes on alcohol are not just another kind of fungible tax on goods. Rather than being an incidental by-product of the end of Prohibition, alcohol taxes were, in themselves, an important *reason for* the end of Prohibition. Put another way, the imposition of state alcohol taxes was part of the *quid pro quo* that led to enactment and ratification of the Twenty-first Amendment in the first place.

The history itself is well-recognized. As early commentators noted, "[t]he repeal of prohibition was brought about as much by the need for revenue as by the desire to eradicate the evils that grew out of that social experiment." *After Repeal*

173; *see also id.* (advocates of repeal found motivation in a desire to "[t]urn the bootlegger's profits into public revenues"); E. Behr, *Prohibition: Thirteen Years That Changed America* 232-33 (1996). But that goal can only be served, of course, if States are actually able to collect the taxes; to obtain the revenues that they looked for, States must have the right to impose rational conditions to assure proper payment. Thus, once it is recognized that the end of Prohibition was partly set in motion by a need for alcohol taxes, it is plainly counter-historical for liquor sellers to claim that the Constitution denies the States the means of most effectively obtaining them. That theory ultimately devalues one side of the expected bargain, allowing sellers, but not States, the full benefits of repeal. *See* Pet. App. (03-1274) at 28a (noting "burden" of attempting to assure compliance with tax laws).

It is also clear that effective tax collection is important, not just as an end in itself, but as a means of repressing alcohol consumption within the State. While the overall impact is debated, it is clear, at the very least, that States have *intended* alcohol taxes to depress consumption, even as they deal with the concern that excessive taxation would cause consumers to seek out illegal sellers. Reiter, *Citizens or Sinners? The Economic and Political Inequity of 'Sin Taxes' on Tobacco and Alcohol Products*, 29 Colum. J. of Law & Soc. Prob. 443, 449 (1996). Moreover, the revenues from alcohol taxes, taken along with license fees, fund enforcement of the state liquor laws, and support programs that assist state citizens suffering from alcohol-related illnesses. If those revenues are diminished by lack of collection, it follows either that state alcohol programs must be scaled back (at a time when, under plaintiffs' proposed nationwide distribution system, the difficulties of enforcement will be vastly increased), or that funds must be siphoned away from other competing state programs. The restriction of out-of-state retail sales avoids these unpalatable and unnecessary choices, assuring that local

licensees—holding seizable assets within the taxing jurisdiction—are responsible for collecting and remitting the taxes that the laws impose.

3. Largely disregarding these state interests, plaintiffs suggest that the only legitimate goal served by the Twenty-first Amendment is "temperance." But that suggestion, even if correct, would not help them in these cases. Whatever may be said about other kinds of state restrictions, the provisions limiting sales by out-of-state sellers *do* promote temperance. As we have discussed, the traditional licensing scheme necessarily leads to sales made by local retail sellers concerned about the threat of license revocation and other severe sanctions, increasing the likelihood that they will deny sales to those persons—in particular, to minors—for whom liquor is inappropriate. That is an advancement of temperance in a most specific and critical sense. And, insofar as taxes (if collected) reduce consumption, the more general interest in temperance is advanced as well.

In any event, the idea that temperance is the only real goal of the Twenty-first Amendment rests upon a misreading of the historical record. Quite apart from the importance of tax revenues to its ratification, it is plain that the drafters and ratifiers of the Twenty-first Amendment did not envision anything approaching an open market in liquor, limited only by laws specifically intended to shelter "dry" States. Quite the opposite: as we have discussed, the focus of alcohol-related efforts following repeal of Prohibition was upon identifying and implementing effective forms of state *regulation*. *See Capital Cities Cable*, 467 U.S. at 713 ("core § 2 power" is power "to regulate the sale or use of liquor within its borders.") What the States sought to do—and what the Twenty-first Amendment permitted them to do—was to impose much tighter means of control that would provide for sales of alcohol but avoid the distribution problems of the past. The systems that they chose, including restrictions on direct out-of-state

sales, were designed to meet that goal. While plaintiffs now seek to replace those traditional systems—substituting a broad national marketplace in which out-of-state liquor sellers enjoy full benefits without being subject to full oversight—that view of liquor sales is very different from the one embodied in the Twenty-first Amendment.

II. THE DORMANT COMMERCE CLAUSE DOES NOT BAR STATES FROM RESTRICTING RETAIL SALES BY OUT-OF-STATE VENDORS

A. For several reasons, the dormant Commerce Clause does not prevent States from serving their legitimate interests in controlling alcohol distribution by limiting out-of-state retail sales. First of all, it is well-established that Congress may authorize state actions that the dormant Commerce Clause would foreclose. *See Quill Corp.*, 504 U.S. at 305; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). The Webb-Kenyon Act, by its express terms, does just that. In language similar to that of the Twenty-first Amendment, the Act prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . in violation of any law of such State . . . ." 27 U.S.C. § 122. That provision gives state laws restricting "[t]he shipment or transportation" of liquor the weight of explicit federal approval, thus removing whatever check the dormant Commerce Clause might place on laws restricting sales to consumers by out-of-state vendors.

We will not repeat the arguments made on this point by the Michigan petitioners and New York respondents, which demonstrate that the Act does what it purports to do. We note only that Congress chose to reenact the Webb-Kenyon Act at a time—1935—when it was well aware that States, under both the monopoly and three-tier licensing models, would typically be providing for retail sales only by State-controlled entities or by licensed vendors subject to comprehensive state

oversight. (As we have noted, those were the alternative systems proposed by the well-known Rockefeller Report.) It seems highly improbable, therefore, that Congress, in affirmatively prohibiting shipments of alcohol in violation of state law, somehow meant to allow free passage to retail shipments that would have fallen afoul of virtually every state regulatory system at the time. The more sensible reading of the Act is that it intended to permit States to regulate the heretofore untrammeled traffic in liquor by doing precisely what they were doing: restricting the privilege of direct selling to the State itself or to those under its full control.

B. In any event, the Twenty-first Amendment itself authorizes the laws at issue here. By its plain language, the Amendment focuses on two activities— "transportation" and "importation" for delivery or use—declaring either to be prohibited if conducted "in violation of the laws" of any State. Under any normal construction of those words, the Amendment would appear to authorize a law that bars out-of-state sellers from directly importing their alcoholic products for delivery to consumers, and the States plainly thought that it did. *See* pages 9-13 *supra*. Without question, the Amendment has that effect with respect to laws barring *all* sales of liquor. It should have the same effect as applied to regulatory schemes aimed at exercising strict control over the conditions under which alcoholic beverages may be distributed and sold.

The early cases addressing the Twenty-first Amendment certainly saw no grounds for a narrow interpretation. Although the full vitality of those cases is open to question, *see* pages 23-26 *infra*, those cases do, at least, reflect a more or less contemporaneous interpretation of what the Amendment was intended to do. Thus, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court stated that "[t]he words used [in the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which

it prescribes." *Id.* at 62. Shortly thereafter, the Court stated flatly: "Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . . ." *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939). *See also Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938).

The initial cases from this Court thus were highly respectful of state regulatory authority under the Twenty-first Amendment. In addition, the Court indirectly acknowledged the important regulatory interest in having local control over alcohol distributors. In a case involving a suit brought by an out-of-state corporation, the Court dismissed a challenge to certain Pennsylvania licensing fees—which were substantially higher for distributors that sold imported beer—on the ground that the out-of-state plaintiff lacked standing to bring the suit. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936). Addressing the applicable state law, the Court noted that "no one may sell beer in Pennsylvania unless duly licensed; and no license may issue to a corporation unless all of its officers and directors, and fifty-one per cent of its stockholders, have been residents of the State for the period of at least two years prior to the application for a license." *Id.* at 227-28. The Court then observed that "*[t]he constitutional validity of that provision is conceded . . . .*" *Id.* at 228 (emphasis added). Because the Court accepted that the State could require in-state residence as a valid condition of granting a license, it followed automatically that an ineligible out-of-state business could not complain about how fees for that license were determined.[6]

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[6] We note that the constitutionality of "residence" requirements is not before the Court in these cases. Plaintiff wineries were denied the right to sell in Michigan and New York because they are not located in those States. *See* Pet. App. (03-1116) at 6a; Pet. App. (03-1274) at 25a. The cases thus do not involve a situation in which the location requirement is

Some years later, in *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972), the Court likewise upheld a state law requiring an out-of-state liquor producer to have a substantial presence within the State. The Court did so even though it expressly recognized that the in-state presence "served none of [the producer's] business interests," *id.* at 277, and that it made the producer subject to a South Carolina tax that it otherwise could have avoided. Despite those adverse effects, the Court found that the requirement of a significant in-state presence was part of "a regulatory scheme that serves legitimate State purposes other than assuring that the State may tax the firm's income . . . ." *Id.* at 282. *See also Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939) (approving state policy of "limiting [liquor] traffic in order to minimize well-known evils, and secure payment of revenue.")

It is true, of course, that the Court has since cast doubt on the seemingly absolute language of its early decisions. Thus, it is no longer possible to claim, if it ever was, that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]." *Hostetter*, 377 U.S. at 331-32 (rejecting that view). But our position here does not depend on that kind of expansive reading of the Twenty-first Amendment. Rather, it rests on the much more basic notion that the Twenty-first Amendment, at its core, permits the States to exercise strict control over how, and where, liquor is distributed to their citizens. That is, under the Amendment, a State may constitutionally impose restrictions on importation that rationally advance its interests in protecting against uncontrolled distribution and in safeguarding its claim to important revenues.

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satisfied but a right to sell is nonetheless denied on the ground of lack of citizenship.

That more limited principle, far from being eroded by decisions of this Court, has received repeated approval. While recent cases have struck down state laws that interfere with congressional power under the Commerce Clause, or that are incompatible with principles of other constitutional amendments, or that violate the dormant Commerce Clause by imposing a discriminatory tax, *see* pages 26-29 *infra*, no case has repudiated, or even cast serious doubt upon, the States' authority to dictate how liquor is sold within their borders. Indeed, in addressing various other questions, the Court has made clear that the power to control distribution of liquor lies at the heart of the authority that the Twenty-first Amendment grants to the States. Thus, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court recognized that "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *Id.* at 516. And, as we pointed out earlier, *see* page 7 *supra*, the Court in *Midcal* regarded the States as having "virtually complete control" over "how to structure the liquor distribution system." 445 U.S. at 110. *See also Capital Cities Cable*, 467 U.S. at 712.

Plaintiffs thus are only partly correct in asserting that the later cases of this Court have recognized an expanded role for the Commerce Clause and a less extensive role for the Twenty-first Amendment. While it is certainly true that the latter does not displace the former with respect to any and all matters involving treatment of alcohol—as it might have done in the *Young's Market* era—that does not mean that the Twenty-first Amendment takes a back seat with respect to laws within its legitimate scope. To the contrary, where the right to control how liquor is sold is at issue, the Twenty-first Amendment continues to have decisive force.

The decision in *North Dakota v. United States*, 495 U.S. 423 (1990), makes this apparent. There, the Court upheld a North Dakota statute requiring out-of-state shippers to file monthly reports and to affix labels to liquor for sale in federal enclaves within the State. Citing the "virtually complete control" standard set forth in *Midcal*, the plurality found that "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *Id.* at 432 (plurality opinion); *see id.* at 438-39 (noting "extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue.") Concluding that the North Dakota regulations did not improperly single out the United States for unfavorable treatment, the plurality pointed out that under the State's three-tier system "[a]ll other liquor retailers are required to purchase from state-licensed wholesalers, who are legally bound to comply with the State's liquor distribution system." *Id.* at 439.

In a separate opinion, Justice Scalia, concurring in the judgment, addressed a question close to that presented here: whether North Dakota could require the United States to purchase its liquor from in-state wholesalers rather than from out-of-state suppliers. His conclusion was that it could. Justice Scalia first noted that "[t]he Twenty-first Amendment . . . is binding on the Federal Government like everyone else . . . ." *Id.* at 447. He then stated flatly that the Amendment "empowers North Dakota to require that all liquor sold for use in the State *be purchased from a licensed in-state wholesaler*." *Id.* (emphasis added).

The reasoning of both those opinions is directly relevant here. Like the North Dakota laws, the Michigan and New York restrictions against out-of-state retail sales serve

legitimate state interests in "controlling the distribution of liquor" and "raising revenue." *See* 495 U.S. at 439 (plurality opinion). Furthermore, they stand on the same footing as the North Dakota requirement that all retailers purchase their liquor from "licensed in-state wholesaler[s]." *See id.* at 447 (Scalia, J., concurring in the judgment). If the Twenty-first Amendment empowers a State to require all retailers (including the Federal Government) to purchase liquor only from licensed in-state vendors, it seems evident that it would also empower a State to require that its own citizens purchase liquor only from licensed in-state vendors. Although one requirement applies at the wholesale level, the other at retail, they constitute interrelated parts of a comprehensive regulatory program aimed at exercising vigorous control over the sale of liquor.[7]

C. To counter the decision in *North Dakota*, plaintiffs rely heavily on *Bacchus Imports*, which struck down part of a state tax scheme on dormant Commerce Clause grounds. But, in *Bacchus*, the tax law in question—which exempted certain local alcoholic products from a general state tax—bore, at best, an attenuated connection to the act of importation, and none at all to transportation, the two activities to which the Twenty-first Amendment is primarily addressed. Morever, the State never contended (and, seemingly, could not have contended) that the tax was an integral part of a traditional regulatory system or that it served important state interests in controlling liquor traffic and raising needed revenue. Instead, the State justified the differential treatment

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[7] Although Justice Scalia, in his opinion, did not refer to the Commerce Clause, it is fair to assume that his conclusion regarding the in-state sale requirement takes it into account. Even apart from the unqualified nature of the statement that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler" (495 U.S. at 447), the United States' option of complying with that requirement would be of no significance if it was invalid under the Commerce Clause.

solely on the ground that it promoted local industry. *See* 468 U.S. at 270-71. The Court found that particular explanation to fit poorly with the objectives safeguarded by the Twenty-first Amendment, saying that "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276.

The laws at issue here, however, *are* designed to combat the evils of unrestricted liquor traffic. Like most States—whether they have chosen to implement the monopoly system or the three-tier system—Michigan and New York impose strict regulations limiting who can sell alcohol and under what conditions they can do so. Faced with the prospect of sales by thousands of producers and resellers—most of whom are beyond the full regulatory authority of any given State—the States have elected to bring the sale of liquor as close to home as possible, limiting direct sales by out-of-state dealers. That goal, unlike "mere economic protectionism," is one properly recognized and protected by the Twenty-first Amendment. *See Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) (upholding local liquor warehousing requirement on the ground that it served valid enforcement objectives.)

To be sure, a law specifically restricting sales by out-of-state entities will, by its very nature, tend to benefit in-state entities. But, contrary to what plaintiffs appear to believe, that is the beginning, not the end, of the relevant constitutional analysis. The critical question remains whether the law properly serves ends cognizable under the Twenty-first Amendment. If not, as was the case in *Bacchus*, the law cannot be "saved" by that Amendment. But if the law does serve legitimate ends, as it does here, it is not rendered invalid simply because, to serve those ends, its provisions must be directed towards out-of-state businesses. *See*

generally Toomer v. Witsell, 334 U.S. 385, 396 (1948) (under Privileges and Immunities Clause, States may favor their citizens "where there are perfectly valid independent reasons for it."); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (applying *Toomer* standard).

The other cases relied on by plaintiffs deserve only brief mention. For the most part, the cases involve conflicts between state laws regulating some aspect of the liquor trade and constitutional provisions other than the Commerce Clause. *See, e.g., 44 Liquormart, Inc., supra*; *Capital Cities Cable, supra*; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Craig v. Boren, supra*; *Hostetter, supra*. In resolving those conflicts, this Court has taken the unstartling position that, however broad the authority conferred by the Twenty-first Amendment, it does not permit States to regulate liquor traffic without regard to values embodied in other constitutional provisions like the First Amendment. As the Court observed in *Craig*, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." 429 U.S. at 206. The reverse is also true: given that their challenges are specifically grounded in the Commerce Clause, plaintiffs can find little support in decisions with respect to different constitutional provisions.

The remaining few cases, though they do at least involve the Commerce Clause, are scarcely more on point. To the extent that States have argued that the Twenty-first Amendment allows them to take actions affecting liquor pricing in other States, *see Healy v. The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court has expressed an obvious reluctance to endorse the authority of one State to export its pricing structure to other States (who, of course, have their own regulatory powers under the Twenty-first Amendment). There is no such problem here:

nothing in the Michigan or New York laws "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Healy*, 491 U.S. at 337. To the contrary, each State seeks only to exercise the fullest control over what happens *within* the State itself, protecting its ability to control distribution of alcohol against the prospect of unrestrained direct sales from outside its borders. And nothing in the Michigan or New York laws brings into question the power of the Federal Government to regulate interstate commerce with regard to alcoholic beverages, an issue that necessarily requires definition of the residual Commerce Clause power left to the Federal Government after ratification of the Twenty-first Amendment. *See, e.g., Midcal Aluminum, supra.* Indeed, to the extent that federal power is implicated here, it supports, in the form of the Webb-Kenyon Act, the proposition that in-state sales requirements are constitutionally permissible.

In short, plaintiffs are simply mistaken that, except for laws directly promoting temperance, the Commerce Clause requires an open national marketplace for retail sale of alcohol to consumers. To the contrary: the Twenty-first Amendment authorized the States, not just to prohibit or depress sales of alcohol, but to exercise strict control in order to combat the well-known problems of unregulated sales. Rather than being forced to deal with all potential liquor sellers nationwide, States have the authority to insist that sales to consumers be made only by those within the full reach of their regulatory and taxing powers. The regulations at issue here plainly are a legitimate exercise of that authority, and the Twenty-first Amendment assures their validity.

CONCLUSION

The judgment of the Sixth Circuit in Nos. 03-1116 and 03-1120 should be reversed. The judgment of the Second Circuit in No. 03-1274 should be affirmed.

Respectfully submitted,

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